TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 38

MOUNTAIN STATES POWER COMPANY,
APPELLANT,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

FILED APRIL 28, 1936.

SUPREME COURT OF THE UNITED STATES

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[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION

In Equity. No. E3003

MOUNTAIN STATES POWER COMPANY, a Corporation, Complainant,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, THOMAS E. CAREY, Jerry J. O'Connell, and Leonard C. Young as Members of and constituting said Commission, Elmer Holt, as Governor of the State of Montana, Raymond T. Nagle as Attorney General of the State of Montana, Al Hansen, as County Attorney of Fallon County, Montana, Rudolph Nelstead, as County Attorney of Custer County, Montana, and The Baker Civic League of Baker, Montana, an Unincorporated Association, Defendants

BILL OF COMPLAINT—Filed September 25, 1935

To the Honorable the Judges of the District Court of the United States for the District of Montana:

Mountain States Power Company, a corporation, hereinafter designated as "the company," complains and says:

I

Mountain States Power Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is authorized to engage in business in Montana in accordance with the laws of the State of Montana, and is doing business in the State of Montana, with its principal place of business and principal address in Montana, at Kalispell, Montana, and as such is a citizen and resident of the State of Montana.

The company is a public utility within the meaning of Section 3881, Revised Codes of Montana, 1921. Sections [fol. 3] 3879-3913, inclusive, Revised Codes of Montana,

1921, are known as the "Public Service Commission Act", (Chapter 52, Laws of Montana, 1913). The company is subject to the jurisdiction of said Public Service Commission of Montana, exercised in conformity with said Act.

II

During all the times referred to herein the company has owned, operated and controlled, and now owns, operates and controls, plant, equipment and facilities for the transmission, delivery, furnishing and distribution to the public for hire, of electric energy for light, heat and power in the towns of Baker, Westmore and Plevna, all in Fallon County, Montana and in the town of Ismay in Custer County, Montana, and in their immediate environs and commonly and collectively referred to as the "Baker District" by way of distinction from other areas, districts or territory served by the company in Montana.

The company's plant, equipment and facilities in said Baker District consist of electric distribution systems in the said towns of Baker, Ismay, Westmore and Plevna, together with electric distribution lines in suburban areas adjacent thereto and electric transmission lines interconnecting each and all of said towns and areas. Said Baker District is one complete electric operating unit or division and is and has been, as developed, so operated under the immediate supervision of one local manager and his staff with offices in said District. The Company serves approximately 750 customers in said Baker District.

The supply of electric energy distributed by the Company to the public in the Baker district as aforesaid, is derived from two sources; (1) by purchase from an electric generating plant located approximately one mile east of Baker, Montana, and owned and operated by Montana-Dakota Power Company, a corporation, and (2) by production by the company at its own steam generating plant located in Baker, Montana. There exists no relationship between the [fol. 4] company and said Montana-Dakota Power Company except that of purchaser and seller, respectively, and the company is a stranger to any and all persons or corporations furnishing electrical energy to said Montana-Dakota Power Company.

The electric energy so purchased and produced is delivered to the company's facilities at Baker, Montana and

transmitted over the company's transmission system, and at said towns distributed and delivered to patrons over the company's distribution system local to each of said towns. In addition, the company furnishes, delivers and distributes electrical energy over its rural lines to patrons and consumers located intermediate to said points and in the vicinity of each thereof. Service to the inhabitants of each of said towns and suburban areas is rendered by the company under one uniform schedule of rates for the various classes of service.

III

The defendant, Public Service Commission of Montana, is an administrative tribunal of the State of Montana, created by the Act (Chapter 52, Laws of Montana, 1913) of the legislative assembly of Montana, aforesaid, and by the specific provisions of Section 3880, Revised Codes of Montana, 1921, may be sued in the Courts of the United States. That said Public Service Commission of Montana is composed ex officio of the three members of the Board of Railroad Commissioners of Montana.

The defendants, Thomas E. Carey, Jerry J. O'Connell and Leonard C. Young are the duly and regularly elected, qualified and acting members of and constitute the Board of Railroad Commissioners of Montana and ex-officio the Public Service Commission of Montana, established by the Act aforesaid.

IV

That the said Public Service Commission of Montana exercises jurisdiction over the valuations, and the rates, [fol. 5] schedules and charges made by this company for electric energy, distributed and sold by it in the said Baker District.

V

The defendant, F. H. Cooney, is the duly qualified and acting Governor of the State of Montana, charged as the executive thereof with the enforcement of the laws of said State and made a party hereto pursuant to the provisions of Section 266, United States Judicial Code, as amended on February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938, (28 U. S. C. A., Section 380). That said F. H. Cooney,

acting Governor of the State of Montana, did not participate in any of the proceedings herein mentioned and was not a party thereto.

VI

The defendant, Raymond T. Nagle, is the duly elected, qualified and acting Attorney General of the State of Montana, and together with the members of the said Public Service Commission of Montana, is charged with the enforcement of the said Public Service Commission Act. That said Attorney General, Raymond T. Nagle, did not participate in any of the proceedings herein mentioned and was not a party thereto.

VII

The defendant Al Hansen is the duly and regularly elected, qualified and acting County Attorney of Fallon County, Montana. That said Al Hansen did not participate in any of the proceedings herein mentioned as said County Attorney and said County of Fallon was not a party thereto.

The defendant Rudolph Nelstead is the duly and regularly elected, qualified and acting County Attorney of Custer County, Montana. That said Rudolph Nelstead did not participate in any of the proceedings herein mentioned and was not a party thereto, individually or as said County Attorney.

The said County Attorneys are charged with the enforce-
[fol. 6] ment of said Public Service Commission Act under said defendant Attorney General in their respective counties, as aforesaid.

VIII

The defendant, The Baker Civic League of Baker, Montana, is an unincorporated association of persons at Baker, in Fallon County, Montana.

IX

Each and all of said defendants are residents and citizens of the State of Montana. This is a civil suit in equity and the matters in controversy and in question herein arise under the Constitution and laws of the United States of America, as hereinafter more specifically alleged and the

sum in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

X

That on or about February 20, 1935, pursuant to a complaint theretofore filed by an unincorporated association styled Baker Civic League of Baker, Montana, alleging that the rates of the company at Baker, Montana were unreasonably high, unjust and discriminatory, said Commission in its Docket No. 1435, served the company with a Notice of Hearing on said complaint, setting the time therefor on March 14, 1935, at Baker, Montana. Pursuant to such notice a hearing was had before said Commission, commencing on the date aforesaid at Baker, Montana. At said hearing the company presented to said Commission, sworn, competent and material evidence and exhibits in full support and complete justification of its existing rates and property values, and submitted its business to the examination and scrutiny of said Commission and said complainant Baker Civic League. There was not presented to the Commission any substantial, relevant, competent or material evidence or testimony in support of the allegation of said complainant nor in dispute or contradiction of complainant's evidence, testimony and exhibits so presented.

[fol. 7] On or about September 13, 1935, a majority of said Commission, to-wit, Commissioners Carey and O'Connell issued their Report and Order No. 1666 in said Docket 1435, wherein and whereby said Commission purported to fix the present fair value of the company's property in the Baker District and ordered certain material reductions in the existing rates of the company. A full, true and correct copy of said Report and Order No. 1666 is attached hereto, marked Exhibit "A" and by this reference made a part hereof.

XI

Pursuant to the provisions of Sections 3884 and 3895, Revised Codes of Montana, 1921, which provide that the Commission shall value all the property of every public utility used and useful for the convenience of the public, the company made, prepared and submitted to the Commission and offered in evidence at the said hearing before the Commission a complete detailed inventory and appraisal of its

electrical property in said Baker District. Said inventory and appraisal was prepared with great care, in great detail, and by competent and experienced electrical valuation engineers; inspection and a count of all physcial property, so far as the same could be examined, was made in the field, and a study, determination and report was made of the cost of reproduction of said property as of December 31, 1934, including proper allowances for materials and supplies, working capital, going concern value and other elements of value of $156,166.00 upon the basis of reproduction new as of that date; and found, claimed and supported a value of $137,686.00 upon a basis of reproduction new less accrued depreciation.

In addition to presenting evidence with respect to reproduction cost new and reproduction new less accrued depreciation, the company prepared and submitted to the Commission and offered in evidence at said hearing before the Commission, an exhibit and supporting testimony disclosing the book cost of the property in the Baker District [fol. 8] as of December 31, 1934, to be the sum of $152,712.01.

Although received in evidence, these valuations and competent supporting testimony upon the part of the company were given no consideration by the Commission, thus giving no effect whatsoever to any part of the evidence introduced by the company with respect to the value of its property in said Baker District.

No evidence was offered by the complainant Baker Civic League in said proceeding before the Commission with respect to the cost of reproduction, cost of reproduction new less depreciation or book value of the company's property, other than as appears in the reports and exhibits of the company made a part of the record before the Commission.

XII

The present fair value of the company's properties used and useful for the convenience of the public in said Baker District in the State of Montana and as the same existed and was in service on December 31, 1934, (and now exists and is now in service, exclusive of net additions and betterments made since December 31, 1934), was on said date and now is in excess of $137,686.00 (including the steam generating plant at Baker, Montana and including working

capital, material and supplies, going concern value and other proper and lawful elements of value), whereas said Commission fixed said value as of December 31, 1934 at "not to exceed the sum of $55,000.00". If said steam generating plant at Baker, Montana were excluded, the remaining fair value as above indicated would be in excess of $113,580.30.

XIII

The value of $55,000.00 found and determined by the Commission in its said Report and Order No. 1666 was and is unreasonable, arbitrary and confiscatory in that the Commission has failed and refused to consider or find the present true fair value of the company's property; that the [fol. 9] order is not supported by the evidence given in said cause, is contrary to law, is contrary to the facts, is unfair, unreasonable, evasive, confiscatory and void.

XIV

The Report and Order No. 1666 of the Commission is further unreasonable, arbitrary, capricious, confiscatory, unfair, evasive and void in that the Commission has wholly failed and refused to make any findings of fact whatsoever supporting its said order with respect to the value of the company's property; in that through such failure and refusal to make findings of fact as to material or any elements of value going to make up ultimate fair value, it has disregarded the rights of the company, making it impossible of determination, the allowance, if any, so found or made by the Commission for any element of value or whether any allowance whatsoever was made for any particular material, proper and lawful element of ultimate fair value; and in that by its failure to so make findings of fact with respect to value and elements of value, it has displayed a plain intent to make it impossible of determination the consideration or weight it gave to the evidence of the company upon the following elements of value, to-wit: cost of reproduction, cost of reproduction less accrued depreciation, book value, working capital, materials and supplies and/or going concern value and other material proper and lawful elements of value, all of which are essential elements in a proper and lawful determination of the present fair value of the property. The action of the Commission described

in this paragraph in making its Report and Order wholly without and in disregard of findings of fact in support thereof, is unlawful procedure and denies to the company its right to a determination in a lawful manner of the present fair value of its said property.

Good conscience and equity dictate, contemplate and re- [fol. 10] quire that there should be a full and frank disclosure by the Commission of its methods of valuation and that through the making of findings of fact with respect to value and elements of value, ample opportunity shall be afforded to question and contest the methods actually employed and the principles applied. The failure, refusal and neglect of the Commission so to do, has resulted in denying to the company due process of law or equal protection of the law since it hinders and disables the company from attacking the specific errors and omissions made by the Commission and permits only challenge of the erroneous final result.

XV

The value of $55,000.00 so determined by the Commission was determined for the purpose of fixing, establishing and regulating the rates and earnings which the company will be permitted to charge and collect for electric service and for the use of its property and said Commission has in its said Report and Order No. 1666, and will in the future so use and apply the said value or rate base unless restained by order of this court.

Insofar as the value or rate base so determined by the Commission is less than the true and lawful present fair value of the Company's property, to-wit, the difference between $55,000.00 and $137,686.00 (or $113,580.38) as heretofore alleged, said property will be used in public service without any compensation therefor and will be confiscated and taken without due process of law unless restrained by order of this court.

The Commission will have occasion to and is required by the provisions of Section 3899, Revised Codes of Montana, 1921, to, from time to time, consider, fix, establish and adjust rates of the company and in any such proceeding the company will be seriously prejudiced by the facts of said inadequate and invalid valuation of its property so heretofore made by the Commission and the same will be considered by the Commission as the vital, pivotal and con-

[fol. 11] trolling factor in so fixing and establishing such rates. In any such proceeding it will be impractical to secure a reconsideration or redetermination by the Commission of its prior valuation of the company's property and no remedy will be available to the company in respect of said inadequate and invalid valuation in connection with such proceeding or at all. Said Commission has in fact by its said Report and Order No. 1666 so attempted to apply said inadequate and invalid valuation in reducing the rates and earnings of the company as hereinafter more fully set forth.

XVI

The company at the time of the hearing hereinbefore referred to was and continuously from April 1, 1929, to the date of said hearing, had been distributing, delivering and selling electric energy for public and private consumption and use in the towns and areas aforesaid under rates and charges approved and concurred in by the Public Service Commission of Montana, all of which said rates and charges have been in full force and effect since April 1, 1929, pursuant to approval of the said Public Service Commission of Montana. By its said Report and Order No. 1666, the Commission ordered the company to reduce its said existing rates on an average of approximately 32%, to a schedule of rates and charges set forth in detail in said Report and Order No. 1666, (Exhibit "A"). The application of said reduced rates and charges will, on the basis of the 1934 business of the company, reduce its annual gross electric revenue of $32,263.80 under existing rates, to $23,146.80 under the reduced rates, or a reduction of $9,117.00 per year.

Under existing rates, and on the basis of 1934 business, the net return of the company in the Baker district does not exceed 1.49% upon a rate base or value of $137,686.00 and such return does not exceed 2.55% upon a rate base or [fol. 12] value of $113,580.38. Said rate bases or values of $137,686.00 and $113,580.38, being the minimum rate bases or values hereinbefore referred to and being the lowest possible rate bases or values justified by the record before the Commission in the proceeding culminating the entry of the Report and Order No. 1666 (Exhibit "A"). Applying the reduced rates as ordered by the Commission to said

minimum value or rate base of $137,686.00, the company would sustain a loss of $7,062.67 per year and applying said reduced rates to said minimum value or rate base of $113,580.38 the company would sustain a loss of $6,225.26 per year. Under this computation the company's expenses, exclusive of any allowance for depreciation, exceed the annual gross electric revenue by $2,450.26 and $2,288.24 respectively.

Applying the reduced rates as ordered by the Commission to the valuation of $55,000.00 as determined by the Commission, the Company would be operating at a loss of $4,433.24 per year.

XVIII

In addition to the ruinous and confiscatory losses in revenue and earnings which the company would sustain if it were required to accept said valuation of $55,000.00 and the reduction in rates as ordered by the Commission, as heretofore pleaded, the company would sustain other, further and confiscatory losses by reason of the requirement of amortizing and retiring from its fixed capital accounts that portion thereof representing the difference between $152,712.01 (the fixed capital as of December 31, 1934) and said Commission valuation of $55,000.00—or $97,712.01. Assuming such amortization should be accomplished within a period of ten years, the amount to be written off and retired would approximate $9,700.00 per year.

XIX

As heretofore alleged the Commission made no findings of fact in support of its conclusions and order. That portion of Exhibit "A" other than the order proper, has no [fol. 13] designation but appears to be a general statement or discussion of certain issues presented. It is therefore impossible for the company to take specific exception to definite and designated findings.

Reference is made in said discussion in Exhibit "A" to the steam generating plant located at Baker, Montana, to the annual allowance for depreciation of the property and the assertion is made that a reduction in rates would have a tendency to increase consumption. The company excepts to each of these statements and alleges that each of said

statements are contrary to the evidence of record before said Commission and are not supported by the record.

XX

Said valuation of $55,000.00 and any schedule of rates and charges promulgated in accordance with the Report and Order No. 1666, and each of them, is confiscatory, unlawful, unreasonable and void and the enforcement thereof and threatened continuance of said enforcement, as hereinafter alleged, has deprived, now deprives and will continue to deprive the company of its property without due process of law and deny to the company the equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States of America, in that to force and compel this company to sell and distribute electric energy, as hereinbefore provided, under said valuation and/or under said report and order and/or under any schedule of rates and charges promulgated in accordance therewith, would be a confiscation of the property of this company, used and useful in the sale and distribution of electric energy in said Baker District.

XXI

By the terms of said Report and Order No. 1666, which was served upon the company on September 17, 1935, the company was and is required to comply therewith on or before September 25, 1935.

[fol. 14] On September 23, 1935, the company filed with the Commission a petition for rehearing of the issues, matters and things involved in said Report and Order No. 1666, Docket No. 1435, of said Public Service Commission of Montana together with an application for the suspension and stay of said Report and Order, pending such rehearing. A full, true and correct copy of said petition and application is attached hereto, marked Exhibit "B" and by this reference made a part hereof.

On the same day, to-wit: September 23, 1935, said Commission made and entered its order denying both said petition for rehearing and application for stay. A full, true and correct copy of said order is attached hereto, marked Exhibit "C" and by this reference made a part hereof.

XXII

The company is prevented by Section 3906, Revised Codes of Montana, 1921, from obtaining a supersedeas, temporary restraining order and an injunction pendente lite in the courts of the State of Montana, to prevent or restrain the enforcement of the Report and Order No. 1666 with respect to the schedule of rates and charges promulgated by the said Public Service Commission of Montana.

XXIII

The Company has no plain, speedy or adequate remedy at law and the defendants, the Commission, the Attorney General, and the County Attorneys threaten to, and will apply and/or enforce and will continue to apply and/or enforce said Report and Order and the company will be forced and compelled to submit to the confiscation of its property without due process of law and without the equal protection of the laws and in violation of its rights under the Constitution of the United States unless the defendants, through the interposition of the equitable jurisdiction of this court are restrained from so applying and/or enforc- [fol. 15] ing said Report and Order.

XXIV

The company, its officers, agents and employees are required at the risk of heavy, excessive and unreasonable penalties as provided in Sections 3888 and 3908, Revised Codes of Montana, 1921, to comply with said Report and Order. Failure to comply with said Report and Order and to submit to the confiscation of its property as hereinbefore alleged, will subject the company to a multiplicity of suits at the instance of both said defendants and of many of the company's patrons upwards of 750 in number in the Baker District.

The issues which will be presented in each of said multiplicity of suits are presented and can and should be decided and determined in this suit. The application and/or enforcement of said Report and Order by the defendants will result in the total loss of revenue to the company which cannot be recovered in any manner and such loss of revenue will cause the company to suffer great and irreparable damage. If said rates and charges promulgated

by said Commission and set forth in said Report and Order are allowed or permitted to become effective forthwith as ordered and the company should prevail upon final decree herein, the company could not recover the sums to it lost and withheld by its customers under said reduced rates except in rare instances and the company would in many instances be required to sue therefor subjecting itself and this honorable court to a multiplicity of suits for such purpose, few of which, because of the expenses involved, would pay for their prosecution with the result that said loss of monies under the rates and charges promulgated in said Report and Order would be irreparable.

XXV

The company, in connection with its prayer for a temporary restraining order herein, offers to do equity by:

[fol. 16] (a) Impounding the revenues collected by it from its customers from the sale of electric energy on the basis of its existing rates and charges in excess of the revenues which would accrue to the company by the application of the schedule of rates and charges promulgated pursuant to the requirements of said Report and Order, with the Clerk of this Court, or in any bank or depository designated by this court, subject to the order and disposition of this court as to the accounting to customers therefor, or any other details; or

(b) Post and file a bond in such sum and with such surety as to this court may seem adequate, to be approved by the Judge hereof, conditioned that if it shall be held by final and permanent decree herein that said Report and Order, and the rates and charges therein embodied are lawful and not confiscatory, the Company will refund to its customers the excess paid by its customers under and in accordance with the provisions of its existing schedules over and above the rates and charges provided by said Report and Order.

Wherefore, the complainant company prays:

First. That the value of $55,000.00 determined in said Report and Order of said Commission of September 13, 1935, be decreed to be in violation of the Fourteenth

Amendment to the Constitution of the United States and the Report and Order imposing the same, to be void.

Second. That the schedules of rates and charges promulgated and set forth in said Report and Order of said Commission be decreed to be unjust, unreasonable, unlawful and void and the Report and Order imposing the same to be void and that said rates and charges and the Report and Order promulgating the same be decreed to be in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 17] Third. That the existing and presently effective schedules, rates, charges, classifications, rules and regulations of the company as filed with the Public Service Commission of Montana be decreed and declared to be the just, fair, reasonable and effective schedules, rates, charges, classifications, rules and regulations of the company for electric service in the Baker District in Montana and that the company be permitted to continue to charge and apply the same.

Fourth. That a temporary restraining order issue from this court under the seal thereof, effective forthwith, upon such terms as to the court may seem proper and made operative until hearing on application for interlocutory injunction or until the further order of the court, directed to the said defendants, and each of them, restraining and enjoining the said defendants, and each of them, and/or their successors in office and all persons acting in aid of said defendants, or either of them, or their successors in office, or by their authority from: (a) enforcing, or attempting to enforce by mandamus, by action at law, by suit in equity, by criminal proceedings, by suit to enforce penalties, or in any other manner the said Report and Order No. 1666 of the defendant Commission or any part of said Report and Order, or the schedules of rates and charges promulgated and proposed to be put into effect by a majority of the Commission in said Report and Order No. 1666, or each or any of such schedules, rates or charges; (b) from in any way restraining, interfering with or preventing the company from applying and collecting the rates, charges, classifications, rules and regulations contained in the company's existing tariffs on file with said Commission and applicable in said Baker District in Montana.

Fifth: That an interlocutory injunction issue from this court, under the seal thereof, effective upon such terms as to the court may seem proper and operative until the is-
[fol. 18] suance of a permanent injunction or other final disposition of this cause, directed to the said defendants, and each of them, restraining and enjoining the said defendants, and each of them, and/or their successors in office and all persons acting in aid of said defendants, or either of them, or their successors in office, or by their authority from: (a) enforcing, or attempting to enforce by mandamus, by action at law, by suit in equity, by criminal proceedings, by suit to enforce penalties, or in any other manner the said Report and Order No. 1666 of the defendant Commission or any part of said Report and Order, or the schedules of rates and charges promulgated and proposed to be put into effect by a majority of the Commission in said Report and Order No. 1666, or each or any of such schedules, rates or charges; (b) from in any way restraining, interfering with or preventing the company from applying and collecting the rates, charges, classifications, rules and regulations contained in the company's existing tariffs on file with said Commission and applicable in said Baker District in Montana.

Sixth. That upon final hearing the said interlocutory injunction be made permanent and perpetual.

Seventh. That the complainant company have such other and further relief as may be just and equitable in the premises.

May it Please Your Honors to grant unto the complainant company a Writ of Subpoena of the United States of America, issuing out of and under the seal of this Honorable Court directed to the said defendants, Public Service Commission of Montana, Thomas E. Carey, Jerry J. O'Connell and Leonard C. Young, as Members of and constituting said Commission, F. H. Cooney as Governor of the State of Montana, Raymond T. Nagle as Attorney General of the State of Montana, Al Hansen, as County Attorney of Fallon County, Montana, Rudolph Nelstead,
[fol. 19] as County Attorney of Custer County, Montana and The Baker Civic League of Baker, Montana, an unincorporated association, commanding them, and each of them, on a day certain, to be named therein and under a

penalty to be and appear before this Honorable Court then and there to answer, but not under oath, answer under oath being hereby expressly waived, all and singular the premises and to perform and abide by such orders, direction or decree as may be made against them in the premises.

And the complainant company will ever pray.

Mountain States Power Company, by E. G. Toomey, Residing at Helena, Montana; John W. Chapman, Residing at Helena, Montana; Hance H. Cleland, Residing at Olympia, Washington; Raymond W. Clifford, Residing at Olympia, Washington, Its Solicitors and Attorneys.

Duly sworn to by E. G. Toomey. Jurat omitted in printing.

[fol. 20] EXHIBIT "A" TO BILL OF COMPLAINT

BEFORE THE PUBLIC SERVICE COMMISSION OF MONTANA

Docket No. 1435

In re Application of The Baker Civic League of Baker, Montana for an Order Readjusting the Electric Light and Power Rates Charged by Mountain States Power Company at Baker, Montana

Report and Order No. 1666

Hearing: March 14th & 15th, 1935.
Decided: September 13, 1935.

Appearances:

For the Baker Civic League: Al Hansen, Attorney, Baker, Montana.

For the Mountain States Power Company: Hance H. Cleland of Cleland & Clifford, Attorneys, Olympia, Washington; E. G. Toomey of Toomey & McFarland, Attorneys, Helena, Montana.

Before Chairman Carey and Commissioners O'Connell and Young at Baker, Montana

[fol. 21] By the COMMISSION:

Upon the filing of a complaint against the Mountain States Power Company charging that its rates for furnish-

ing electricity to the people of Baker were excessive, the Commission set the matter down for hearing and after due notice to the respective parties the matter was heard by the Commission. It appears that this Company in the Baker district furnished electricity to the people of Baker, Ismay, Plevna and Westmore. While the complainants are interested only in the rates in the Town of Baker, the hearing to all intents and purposes took the form of a proceeding to investigate the rates of the entire Baker district, including Baker, Plevna, Westmore and Ismay. The utility company contended that this was necessary under the laws of the State of Montana. The complainants on the other hand did not concede that the entire district must be taken as a unit. Their position was that when the utility company acquired the property now used and useful in serving the people of Baker, Baker was the only City then being furnished with electricity. That subsequent to the acquisition of the plant at Baker the Company extended the line to the other points named.

The complainants take the view that the citizens of Baker have no interest in or concern of the rates in the other places named or with the value of the property used and useful in serving the citizens of the other towns named.

The Commission does not in this proceeding feel called upon to determine the question as to whether the entire district must be treated as a unit or whether Baker may be segregated and considered alone. For the purpose of this proceeding the Commission feels justified in accepting the contention of the utility company but makes no decision as to whether it could do otherwise under the circumstances.

[fol. 22] As a part of the plant and equipment used there is situated in the Town of Baker an electric plant which was formerly used for generating electricity but which has not been in use for more than seven years. The Company contends that this standby plant is to be reckoned in valuing its property used and useful in serving the public. With this we do not agree. The Company purchases its electricity from the Montana Dakota Power Company and receives it at the Town of Baker. There is no reasonable justification for maintaining the electric plant. It is of no use to the citizens of Baker or to the citizens of the Baker district, and there is no reasonable justification for including it in the valuation of the property serviceable to the public.

The Commission on the evidence in the case concludes that a fair present value of all of the property used and useful in serving the public in the Baker district does not exceed the sum of $55,000.00. Whether it amounts to that much or not we do not now determine; certainly it does not exceed that value.

There was evidence introduced from which it is contended by complainants that there had already been taken from the earnings of this Company and its predecessors throughout the years more than sufficient by way of depreciation to return to the operator the entire investment in plant and property. Whether this is so or not, it does appear from the evidence that the Company is not entitled to more than 4% on the present value of its property used and useful in the business by way of depreciation.

The earnings of the Company in 1934 amounted to $32,263.80. The expenses of operation, including the purchase price of the electrical energy amounts to $21,420.56 without considering taxes and depreciation.

The taxes paid by the Company for the year 1934 amounted to $3,828.21.

[fol. 23] The Company claims the right to $5,344.92 by way of depreciation but the Commission believes that $2,200.00 is ample to allow by way of depreciation. If we allow but $2,200.00 by way of depreciation the Company would have a net operation revenue for the year 1934 of $4,814.93, or a return of nearly 9% on the value of its property used and useful in the service.

The Commission finds that this is in excess of a fair return, warranting a substantial reduction in the rates. There is ample evidence in the record that a reduction in the rates would have a tendency to increase consumption. The exact effect of a rate reduction cannot be forecast. It might cause no decrease in net operating revenues. We find that in the Town of Baker the Company has inaugurated a system of supplying many houses with two meters; that with the light meter there is a different rate than the appliance meter. This, of course, adds unnecessarily to the expense of equipment necessary to serve the public and we see no reasonable justification for such a system.

The Commission believes that it should order into effect the following schedule of rates to be placed into operation and given a trial for a reasonable period. If at the con-

clusion of a reasonable trial period it is believed that the rate is either excessive or inadequate to yield a fair return, further adjustment will be made by the Commission upon application.

We believe the following rates are reasonable and will afford to the utility a fair return upon the value of its property used and useful in serving the public, to-wit:

General Lighting

Effective in Baker, Ismay, Westmore and Plevna

First 25 KWH per month, 8¢ per kilowatt hour.
All in excess, 4¢ per kilowatt hour.
Minimum Bill $1.00.

[fol. 24] The Schedule "B" rate for commercial and industrial customers shall remain unchanged excepting the minimum bill is reduced from $2.00 to $1.00.

The Schedule "C" for Power:

First 100 KWH per month, 6¢ per kilowatt hour.
Next 400 KWH per month, 5¢ per kilowatt hour.
Next 1000 KWH per month, 4¢ per kilowatt hour.
All in excess KWH per month, 3¢ per kilowatt hour.

Minimum Bill $1.00 per month for power installation of 5 H. P. or less.

Minimum Bill $2.50 per month for power installation of more than 5 H. P.

An appropriate order follows:

[fol. 25] Public Service Commission of Montana

Minutes, September 13, 1935

At a session of the Public Service Commission of Montana, held in its offices of the Capitol Building, Helena, Montana, on the 13th day of September, 1935, present Chairman Carey and Commissioner O'Connell and Young, there regularly came before the Commission for action the matters and things involved in Docket No. 1435, and it appearing that the Commission has this day issued its report herein, which report is hereby referred to and of this Order made a part, and that all matters and things involved have been duly investigated and a public hearing had

whereat all persons interested had opportunity to appear and present their respective interests and now the Commission being fully advised in the premises,

It is therefore ordered that the Mountain States Power Company, Baker, Montana, file with this Board a revised schedule of its rates to conform with the schedules set forth in the report attached hereto and file the proposed schedules with this Commission on or before September 25, 1935, for the approval of the Commission; that the rate as thus approved will be effective on September 1st, 1935, upon motion of Commissioner Jerry J. O'Connell, seconded by Chairman Carey, motion carried by a majority vote; Commission- Young voting in the affirmative in part with the understanding that he will write an explanation and file same with this Report and Order.

It is further ordered that the Secretary shall serve a true and correct copy of this Report and Order upon the parties hereto within five days from the date hereof.

Thomas E. Carey, Chairman; Jerry J. O'Connell, Commissioner, Being and Constituting a Majority of the Board of Railroad Commissioners, ex officio Public Service Commission of Montana; Leonard C. Young, Commissioner.

Attest: Official, Albert A. Angstman, Secretary.

Commissioner Young's explanation follows:

[fol. 26] EXHIBIT "B" TO BILL OF COMPLAINT

BEFORE THE PUBLIC SERVICE COMMISSION OF MONTANA

Docket No. 1435

In re Application of The Baker Civic League of Baker, Montana for an Order Readjusting the Electric Light and Power Rates Charged by Mountain States Power Company at Baker, Montana

PETITION FOR REHEARING AND STAY

Comes now Mountain States Power Company, a corporation, Respondent in the above entitled and numbered docket, and having been served on Tuesday, September 17th, 1935, with copy of Report and Order No. 1666, in said entitled and numbered docket, issued by a majority of said Commission, hereby respectfully petitions your

Honorable Commission for a rehearing and stay upon its said Report and Order No. 1666 on the following grounds:

(1) That the Report and Order is contrary to the evidence in the prescription of the rates and charges therein ordered substituted for existing rates and charges heretofore lawfully approved by said Commission.

(2) That the conclusion in the Report and Order, that the present fair value of the property of respondent used and useful in serving the public in the Baker District "does not exceed the sum of Fifty-five Thousand ($55,000.00) Dollars," is contrary to and is without support in the record of the Commission and is wholly unwarranted by the evidence.

(3) That as shown by the evidence of record in this proceeding, the reduced rates as prescribed and the application of the various elements of revenue and expense result in a wholly inadequate return of earning to respondent, upon the fair value of its property, irrespective of the inclusion or exclusion of the steam generating plant located in the town of Baker, Montana.

(4) That said report in its conclusions with respect to the value of respondent's property and in its conclusions [fol. 27] with respect to a fair return thereon, denies this respondent due process of law, confiscates respondent's property and if this respondent is not relieved therefrom, immediately impairs and must directly and inevitably ruin respondent's capacity to render reasonably adequate service in the Baker district or any service therein.

Wherefore, your respondent respectfully prays your Honorable Commission to reconsider the matter and things involved in said Docket No. 1435 above entitled and grant this respondent, and all concerned, a rehearing thereon and that pending decision of such rehearing, your Honorable Commission forthwith enter its Order completely staying and arresting the provisions of said Report and Order No. 1666 until the further Order of the Commission after completion of full proceedings on rehearing.

Done and dated this 22nd day of September, 1935.

Respectfully submitted, Mountain States Power Company, by E. G. Toomey, Cleland and Clifford, Its Attorneys. Of Counsel: Toomey and McFarland.

STATE OF MONTANA,
County of Lewis and Clark, ss:

E. G. Toomey, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for Mountain States Power Company in the above entitled proceeding and that he makes this verification for and on behalf of said corporation for the reason that none of the officers thereof are at present within the County of Lewis and Clark, State of Montana; that he has read said Petition for Rehearing and knows the contents thereof and that the matters and things therein stated are true of his own knowledge.

E. G. Toomey.

Subscribed and sworn to before me this 22nd day of September, 1935. Cecelia D. Everett, Notary Public for the State of Montana, Residing at Helena, Montana. My commission expires March 10th, 1938. (Notarial Seal.)

[fol. 28] EXHIBIT "C" TO BILL OF COMPLAINT

BEFORE THE PUBLIC SERVICE COMMISSION OF MONTANA

Docket No. 1435

In re Application of The Baker Civic League of Baker, Montana for an Order Readjusting the Electric Light and Power Rates Charged by Mountain States Power Company at Baker, Montana.

Order Denying Rehearing and Stay

The Petition of Mountain States Power Company for a rehearing and for a stay of the Report and Order No. 1666 in the above entitled Docket, coming on regularly for hearing, and the Commission having heard and considered the said petition and the arguments of counsel in support thereof, and being otherwise fully informed in the premises, it is now,

Ordered: That said Petition for rehearing and stay be, and the same is hereby denied.

Done and dated at Helena, Montana, this 23rd day of September, 1935.

Thomas E. Carey, Chairman; Jerry J. O'Connell, Commissioner; Leonard C. Young, Commissioner, Being and Constituting the Board of Railroad Commissioners of the State of Montana, ex Officio Public Service Commission of Montana.

Attest: Official Albert H. Angstman, Secretary.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN FORD—Filed September 25, 1935

STATE OF MONTANA,
County of Lewis and Clark, ss:

John Ford, being first duly sworn on oath, deposes and says:

I make this affidavit in support of the application of the complainant for a preliminary restraining order of the Report and Order No. 1666 of the Public Service Commission of Montana, more particularly referred to in the Bill of Complaint in the above entitled cause.

I am now, and have been for the past three years, Assistant Secretary of Mountain States Power Company, a corporation. I was for several years prior to my selection in that position a member of the accounting staff of said corporation. I am familiar with the books, records and accounts of the corporation and exercise supervision of the detail of all accounting matters with respect to the corporation's accounts including such accounts applicable to the Baker District in Montana.

The books, records and accounts of Mountain States Power Company and with respect to the operations of that company in the State of Montana are kept in accordance with the classification of accounts prescribed by the Public Service Commission of Montana. I was personally present at the hearing before the Public Service Commission of Montana at Baker, Montana commencing on March 14, 1935, involving the valuation and rates of the company in the

Baker District. I am familiar with the Bill of Complaint filed herein and the description of plant, equipment, facilities and the character and nature of operations of the company in the so-called Baker District are substantially as set forth therein. The Baker District is treated as a separate [fol. 30] operating and accounting unit of the corporation.

At said hearing before said Commission, I was a witness on behalf of the company and presented as Exhibit No. 25, a detailed statement by accounts of the company's investment in electrical property in the Baker District. That Exhibit was prepared and showed the investment in the various primary classifications of property such as land, structures, boiler plant equipment, engines, electric plant, power plant equipment, substations, poles, towers and fixtures, overhead conductors, electric services, transformers, meters, street lighting equipment, office equipment, stores equipment, tools, transportation equipment, laboratory equipment and the cost of plant purchased.

As shown by that exhibit which was offered and received in evidence and supported by oral testimony, the book cost of the company's electrical property in the Baker District was, as of December 31, 1934, the sum of $152,712.01.

As further disclosed by said exhibit the company invested in net additions to the plant in this district during the period from October 1, 1926, to December 31, 1934, the sum of $70,595.00.

Exhibits and supporting testimony were likewise presented before said Commission at said hearing showing the cost of reproduction new and cost of reproduction new less accrued depreciation of the electrical property of the company in the Baker district as of December 31, 1934. As disclosed by those Exhibits and said supporting testimony, the cost of reproduction new of said property as of said date was $156,166.00 and the cost of reproduction new less accrued depreciation was $137,686.00.

The book cost of property as above stated of $152,712.01 is cost of physical property only and does not include any allowance for working capital and material and supplies and only a part of the going concern value. The amounts shown above for reproduction cost new and reproduction [fol. 31] cost new less accrued depreciation do contain allowances for working capital and material and supplies and going concern value.

No proof was offered or received by the Commission with respect to the elements of reproduction cost new and reproduction cost new less accrued depreciation except as introduced by the company's witness and by me as above referred to.

In addition to the book cost of property as submitted by me to the Commission, there was offered by counsel for the Baker Civic League and received in evidence as Exhibit No. 1 in said hearing, a detailed report and audit of the company's books and records with respect to its electric property and operations in the Baker District. This report and audit, Exhibit No. 1, was made by Mr. R. D. Miller, the official Auditor of the Public Service Commission of Montana in 1933. This report and audit, Exhibit No. 1, so made by the Commission's representative, disclosed that the conclusions arrived at in said Report and audit were the result of a detailed examination of the company's books, records and accounts and even the individual vouchers.

The report and audit, Exhibit No. 1, contains a summary entitled "statement showing amount invested in property and plant" in the Baker District during the years 1926 to July 31, 1933 and a total shown therein is $152,697.78.

Evidence was introduced before the Commission at said hearing and the record before said Commission discloses that the assessed value of the company's electric property in Fallon County, Montana (a portion of the Baker District) was as of the last taxing date the sum of $94,242.00. This amount was and is used by the taxing authorities of the towns, county and state as the basis for the levy and collection of taxes from the company in that portion of the Baker District represented by Fallon County. The Baker District also includes a portion of Custer County, Montana [fol. 32] and the company has certain of its Baker District property in said Custer County. The record with respect to the assessed value of the company's electrical property in said Custer County was not available and was not presented to the Commission at the hearing.

The Public Service Commission of Montana by its Report and Order No. 1666 found the value of this same property in the Baker District to be presumably as of December 31, 1934, the sum of "not to exceed $55,000.00". In my opinion this valuation so fixed by the Commission is clearly inadequate, unfair and unlawful and will result when applied by

the Commission in the making of rates or otherwise, in the confiscation and taking of the company's property.

Since the book cost of the company's property is as indicated above, $152,712.01, it will become necessary if said valuation of $55,000.00 is sustained, to amortize out of the fixed capital accounts of this company, the difference between said amounts, or $97,712.01. Assuming such amortization should be accomplished within a period of ten years, this will mean that the company would have to write off and retire approximately $9,700.00 per year of its plant. Since the revenues under existing rates are insufficient to return to the company this amount, and since the Commission has ordered a material reduction in the rates of the company, the company if forced to accept said Commission valuation and rate reduction will be operating at a loss of approximately $15,000.00 per year.

Considering the reductions ordered by the Commission in three of the schedules of the company, the average reduction in rates ordered, is approximately 32%.

The application of said reduced rates and charges will, on the basis of the 1934 business of the company, reduce its annual gross electric revenue of $32,263.80 under existing rates to $23,146.80 under the reduced rates,—or an annual reduction of $9,117.00.

[fol. 33] Under existing rates and on the basis of 1934 business, the net return to the company in the Baker District does not exceed 1.49% upon a rate base or a value of $137,686.00. Said rate base or value as here used being the cost of reproduction new less accrued depreciation.

Under existing rates and on the basis of 1934 business, the net return to the company in the Baker District does not exceed 2.55% upon a rate base or value of $113,580.38. Said value or rate base as here used of $113,580.38 being the book value of the company's electric property in the Baker District with the steam generating plant at Baker eliminated.

If the reduced rates as ordered by the Commission are applied to the cost of reproduction new less accrued depreciation of $137,686.00, the company will sustain a loss in revenue of $7,062.67 per year. Applying the reduced rates as ordered by the Commission to said book value less steam plant, ($113,580.38) the company will sustain an actual loss of $6,225.26. By the use of the term "loss" is meant that the company will fail to earn anything for return by the

amounts shown; in other words, these latter figures of $7,062.67 and $6,225.26, are red figures.

Upon this basis and without any allowance for depreciation, the company's expenses would exceed the annual gross electric revenue by more than $2,000.00 per year.

Giving effect to the reduced rates as ordered by the Commission and using the Commission's valuation of $55,000.00, the company would be required to operate at an actual loss of $4,433.24 in addition to the $9,700.00 per year lack of earnings with respect to amortization of its property.

A summary of the elements of fair value, which were before the Commission in its said proceeding and docket No. 1435, and which it patently ignored in arriving at its conclusion as to fair value, are as follows:

[fol. 34] (a) Reproduction cost new as of Dec. 31, 1934 (Exhibit #32) $156,166.00

(b) Reproduction cost new, less accrued depreciation as of Dec. 31, 1934 (Exhibit #33) 137,686.00

(c) Book cost (Company Exhibit #25) as of Dec. 31, 1934, (exclusive of Working Capital, material and supplies, and approximately 50% of going value) 152,712.01

(d) Assessed value, for taxing purposes, in Fallon County, Montana, only (Exhibits #20-21) 94,242.00

(e) Book Cost, as determined in 1933 by the Commission's own Auditor, (Exhibit No. 1) 152,697.78

(f) Book value, as per company testimony, as of Dec. 31, 1934, with the steam generating plant eliminated 113,580.38

Although there was no substantial controverting evidence offered by the Baker Civic League or the Commission, or any other party, and no comparable studies or exhibits, the Commission concluded in its Report and Order No. 1666 that the fair value of this property "did not exceed" $55,000.00.

Under the requirements of the Commission's Report and Order No. 1666 the reduction in rates ordered by it is made effective as of September 1, 1935. Therefore if the company is required to accept the Commission's valuation of

$55,000.00 and the reduced rates, the company has been, since September 1, 1935, sustaining a daily actual operating loss of approximately $41.00, and will continue to sustain such daily loss for a period of at least ten years.

Applying the reduced rates as ordered by the Commission to the cost of reproduction new less accrued depreciation, of $137,686.00, the company has, since September 1, 1935, and will continue indefinitely to sustain a daily actual operating loss of $19.00.

The daily losses above referred to are exclusive of any [fol. 35] allowance for return. In other words, if the reduced rates are applied as indicated, the company will fail to earn any return and will sustain an additional daily loss in the amounts shown.

John Ford.

Subscribed and sworn to before me this 24th day of September, 1935. Cecelia D. Everett, Notary Public for the State of Montana; Residing at Helena, Montana. My commission expires March 10, 1938. (Notarial Seal.)

[File endorsement omitted.]

[fol. 36] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HOWARD F. LILL—Filed September 25, 1935

STATE OF MONTANA,
County of Lewis and Clark, ss:

Howard F. Lill, being first duly sworn on oath, deposes and says:

I make this Affidavit in support of the application of the Complainant Company for a preliminary restraining Order of the Report and Order No. 1666 of the Public Service Commission of Montana, more particularly referred to in the Bill of Complaint in the above entitled cause.

I graduated from the University of Indiana with a Degree in electrical engineering in the year 1917. I have followed and practised that profession continuously since my graduation. I have had in the neighborhood of fifteen years of valuation work. The first four years were mostly

in the valuation of industrial properties and the next eleven or twelve years were spent in inventorying and valuing utility properties, including electric, gas, water, steam heat, street railway and railroads. I have inventoried and appraised public utility properties in nearly every state in the Union and in Canada and Mexico and would say that the reproduction cost of the properties so appraised by me in that time has been between $500,000,000.00 and $600,000,000.00. My qualifications as a valuation and appraisal engineer were not questioned at the time of the hearing hereinafter referred to, in fact, they were admitted by the Attorney for the Baker Civic League.

I was personally present at the hearing before the Public Service Commission of Montana at Baker, Montana commencing on March 14, 1935, involving the valuation and rates of Mountain States Power Company in the Baker District. I am familiar with the Bill of Complaint filed herein and the description therein of plant, equipment, [fol. 37] facilities and the character and nature of operations of the company in that District are substantially as set forth in the Bill of Complaint. The Baker District is treated as, and is in fact, a separate operating unit of the company and is not physically connected with any other electrical property of the company.

At said hearing before the Commission I was a witness on behalf of the company and presented certain exhibits, including Exhibits 32 and 33 of the record before the Commission. Exhibit No. 32 submitted to the Commission, was a detailed inventory and appraisal of the company's electrical property located and operated in the Baker District. This inventory and appraisal were prepared by me in detail and with considerable care and in my opinion correctly record the list of items of property therein referred to and correctly reflect the unit prices and the totals shown therein.

In my opinion the reproduction cost new as of December 31, 1934, of the company's electrical property in the Baker District was $156,166.00, including working capital, material and supplies and going concern value. As shown by my inventory and appraisal the value of the physical property was as of said date $136,747.00.

Exhibit No. 33 offered and received in evidence in the said proceeding before the Commission was a study and tabulation showing the cost of reproduction new less accrued depreciation of the company's electrical property in

the Baker District. In my opinion the amount shown therein for this element of value, $137,686.00 is a fair and correct statement of such value. The depreciated condition of the property was determined by me by an inspection in the field of the various units of property. The reproduction cost new less accrued depreciation of the physical property alone as shown in my said report was $118,267.00.

My said exhibits and supporting and explanatory testimony were the only exhibits and testimony offered and received in evidence in the proceeding before the Commission [fol. 38] with respect to the elements of reproduction cost new and reproduction cost new less accrued depreciation. No comparable or other similar studies were presented by any party or person.

Reference is made in the Commission's Report and Order No. 1666 to the steam generating plant of the company at Baker, Montana and contention was made at the time of the hearing particularly by the Baker Civic League that said steam plant should be eliminated from the valuation. If said steam plant were eliminated from consideration in determining the value of this property, the amount heretofore stated with respect to reproduction cost new and reproduction cost new less accrued depreciation would be reduced. With the steam plant eliminated the cost of reproduction new as of December 31, 1934, would be $123,793.00 and the cost of reproduction new less accrued depreciation would be $116,017.00.

Howard F. Lill.

Subscribed and sworn to before me this 24th day of September, 1935. Cecelia D. Everett, Notary Public for the State of Montana, Residing at Helena, Montana. My commission expires March 10, 1938. (Notarial Seal.)

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER—Filed October 7, 1935

Whereas, it appears to the Court from the duly verified Bill of Complaint, the Exhibits attached thereto and the

Affidavits filed in support thereof, in the above entitled Court and in the above entitled cause, that the Public Service Commission of Montana has issued and rendered a Report and Order Numbered 1666—Docket No. 1435, entitled: "In Re: Application of The Baker Civic League of Baker, Montana for an order readjusting the electric light and power rates charged by Mountain States Power Company at Baker, Montana" wherein said Public Service Commission of Montana has promulgated and ordered enforced a certain schedule of rates and charges for electric service in Baker, Ismay, Westmore and Plevna, Montana, commonly referred to as the Baker District, effective September 25, 1935; and,

It appears that if the complainant, the Mountain States Power Company, is required to sell and distribute electric energy under and in accordance with said Report and Order, said Complainant will be required to operate at a loss and will each day sustain and suffer substantial, irreparable and continuing loss and damage, as is more fully set forth in the Bill of Complaint filed in the above entitled cause, and in said Affidavits, to which reference is hereby made for greater particulars; and

It appears from the said Bill of Complaint, Exhibits attached thereto and Affidavits filed in support thereof, that the requirements, terms and provisions of said Report and Order are unlawful, unjust and confiscatory; and

It appears that there is danger that substantial, irreparable loss and damage would result to the Complainant herein before a hearing on the said application for interlocutory injunction, and that the imminent application of [fol. 40] the rate reductions ordered by the defendant, Public Service Commission of Montana, in said Report and Order is prima facie immediately and daily confiscating the property of the complainant herein, and that the rights of the defendants and all others interested or directly affected by said Report and Order, including the customers of said Complainant, can be fully protected by requiring Complainant to impound the amounts collected by it from each of its customers under existing schedules in the Baker District in Montana in excess of the rates prescribed or allowed by the said Defendant Commission in its said Report and Order No. 1666, and that in the event the rates prescribed by said Defendant Commission in said Report and Order

should be adjudged to be valid, the excess over said prescribed rates collected by the Complainant shall be returned to the said customers from whom collected, and that the power of this Court should be used to accord prompt relief in the premises; and

It appears that if this Court does not immediately and forthwith issue a temporary restraining order, preliminary to a hearing before this Court, in the above entitled cause, a multiplicity of suits and actions will result, as is more fully set forth — Bill of Complaint on file herein, to which reference is made for greater particulars; and

It appears that this Complainant has no plain, speedy and efficient remedy at law or in equity in the Courts of the State of Montana; and

It appears from the duly verified Bill of Complaint, the Exhibits attached thereto and the Affidavits filed in support thereof, in the above entitled Court and in the above entitled cause, that a temporary restraining order, preliminary to a hearing, is proper, justified and required to prevent such substantial, irreparable loss and injury and damage and to prevent a multiplicity of suits and actions, and that the power of this Court should be exercised by the issuance and granting of such restraining order;

[fol. 41] It is Ordered that the Defendants and each of them appear before the above entitled Court in the courtroom of said Court in the Federal Building in the City of Missoula on the 8th day of October, 1935, at the hour of 10:00 o'clock A. M., and then and there show cause, if any they have, why an interlocutory injunction should not issue and continue in force until such final hearing on the said Bill of Complaint; and

It is Further Ordered that Complainant's application and prayer for a temporary restraining order shall be, and it is hereby granted, and the defendants, and each of them, and all persons acting in aid or assistance of said defendants, or their successors in office, be, and are hereby, restrained and enjoined from: (a) enforcing, or attempting to enforce by mandamus, by action at law, by suit in equity, by criminal proceedings, by suit to enforce penalties, or in any other manner the said Report and Order No. 1666 of the defendant Commission or any part of said Report and Order, or the schedules of rates and charges promulgated and proposed to be put into effect by a majority of the

Commission in said Report and Order No. 1666, or each or any of such schedules, rates or charges: (b) from in any way restraining, interfering with or preventing the company from applying and collecting the rates, charges, classifications, rules, and regulations contained in the company's existing tariffs on file with said Commission and applicable in said Baker District in Montana.

It is Further Ordered that said Complainant shall monthly deposit with the Clerk of this court any and all sums of money by it collected from its customers in the Baker District in Montana in excess of the rates and charges prescribed by the said defendant Commission, in its said Report and Order No. 1666, from and after September 1st, 1935, until the further order of this Court, said sums so impounded to be by the Court ordered refunded to the customers from whom collected, pending the operation of this order or any further order of impound-
[fol. 42] ment herein, in the event that the said Report and Order shall be finally adjudged valid; and

It is Further Ordered that this temporary restraining order shall be effective upon the filing with the Clerk of the above entitled Court of a bond conditioned in conformity with this order, in the sum of Ten Thousand dollars ($10,000) Dollars.

It is Further Ordered that a copy of this order, certified under the hand of the Clerk and the Seal of the above entitled Court, be served on each of the defendants to be restrained thereby and upon the Governor of the State of Montana and upon the Attorney General of the State of Montana, at least five (5) days before the date fixed for said hearing;

Dated this 25th day of September, 1935.

Charles N. Pray, United States District Court Judge.

Attest: C. R. Garlow, Clerk, by C. G. Kegel, Deputy. (Seal.)

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Montana, ss:

I hereby certify and return that on the 25th day of September, 1935, at Great Falls, Montana, I received the within Order to Show Cause and Temporary Restraining Order,

and on the 26th day of September, 1935, at Great Falls, Montana, I personally served the Public Service Commission of the State of Montana by exhibiting to Thomas E. Carey, Chairman of said Public Service Commission of Montana, the original Order to Show Cause and Temporary Restraining Order, and by delivering to him a copy of [fol. 43] said original Order to Show Cause and Temporary Restraining Order; further, that I also personally served Jerry J. O'Connell and Leonard C. Young, as members of said Public Service Commission of the State of Montana at Great Falls, Montana, on the 26th day of September, 1935, by exhibiting to each of them the original Order to Show Cause and Temporary Restraining Order, and by delivering to each of them a copy of said original Order to Show Cause and Temporary Restraining Order; further, on the 27th day of September, 1935, at Baker, Montana, I personally served Al Hansen, as County Attorney of Fallon County, Montana, by exhibiting to him the original Order to Show Cause and Temporary Restraining Order, and by delivering to him a copy of said original Order to Show Cause and Temporary Restraining Order; further, that I also, on said 27th day of September, 1935, served The Baker Civic League of Baker, Montana, at Baker, Montana, by exhibiting to M. L. Schneider, as Secretary of The Baker Civic League of Baker, Montana, the original Order to Show Cause and Temporary Restraining Order, and by delivering to him a copy of said Order to Show Cause and Temporary Restraining Order; further, that on the 28th day of September, 1935, at Miles City, Montana, I personally served Rudolph Nelstead, as County Attorney of Custer County, Montana, by exhibiting to him the original Order to Show Cause and Temporary Restraining Order, and by delivering to him a copy of said Order to Show Cause and Temporary Restraining Order.

Sid A. Willis, U. S. Marshal, by W. W. Crawford, Deputy.

UNITED STATES OF AMERICA,
District of Montana, ss:

I hereby certify and return that on the 26th day of September, 1935, I received the within order to show cause and temporary restraining order, and on the said 26th day of September, 1935, I personally served the same on Frank H.

[fol. 44] Cooney as Governor of the State of Montana, and Raymond T. Nagle as Attorney General of the state of Montana, and each of them, in the City of Helena, County of Lewis and Clark, State and District of Montana, by delivering to each of them a copy of said order to show cause and temporary restraining order.

Sid A. Willis, United States Marshal, by E. Lieberg, Deputy.

[File endorsement omitted.]

[fol. 45] IN UNITED STATES DISTRICT COURT

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO QUASH ORDER TO SHOW CAUSE—Filed October 8, 1935

Come now the defendants in the above-entitled action and move the Court to dissolve the Temporary Restraining Order and to Quash the Order to Show Cause entered herein on the 25th day of September, 1935, on the following grounds and for the following reasons, to-wit:

I

That as appears upon the face of the Bill of Complaint and upon the affidavits in support of the Temporary Restraining Order, this Court is without jurisdiction to entertain the action or to make any order therein because it is prohibited from so doing by the Act of Congress of May 14, 1934. (Ch. 283, Sec. 1, 48 St. at large, 775.)

II

That the Bill of Complaint does not state facts sufficient to constitute a cause of action in this Court for equitable or any relief.

Raymond T. Nagle, Attorney General of the State of Montana. A. H. Angstman, Counsel, Public Service Commission of Montana. Al Hansen, County Attorney, Fallon County, Montana.

Service of the foregoing Motion admitted this 8th day of October, 1935.

E. G. Toomey, Hance H. Cleland, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed October 8, 1935

Come now the defendants in the above-entitled action and move the Court to dismiss the above-entitled action and to dismiss the complaint filed therein on the following grounds and for the following reasons, to-wit:

I

That as appears upon the face of the Bill of Complaint this Court is without jurisdiction to entertain the action or to make any order therein because it is prohibited from so doing by the Act of Congress of May 14, 1934. (Ch. 283, Sec. 1, 48 St. at large, 775.)

II

That the Bill of Complaint does not state facts sufficient to constitute a cause of action in this Court.

Raymond T. Nagle, Attorney General of the State of Montana. A. H. Angstman, Counsel, Public Service Commission of Montana. Al Hansen, County Attorney, Fallon County, Montana.

Service of the foregoing Motion to Dismiss admitted this 8th day of October, 1935.

E. G. Toomey, Hance H. Cleland, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 47] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF HEARING

No. 1522, Montana Power Company vs. Public Service Commission of Montana, et al.

No. 3003, Mountain States Power Company vs. Public Service Commission of Montana, et al.

No. 3004, Mountain States Power Company vs. Public Service Commission of Montana, et al.

These three causes came on regularly for hearing this day before the court of three Judges, consisting of Honorable Bert E. Haney, United States Circuit Judge, and Honorable Charles N. Pray and Honorable James H. Baldwin, United States District Judges.

Case No. 1522, Montana Power Company vs. Commission, et al., was duly called for hearing on the motion and application of complainant for an interlocutory injunction, duly filed, and on defendants' motion to dismiss the complaint, this day filed herein.

Mr. William L. Murphy, Mr. J. T. Finlen, Jr., and Mr. J. E. Corette, Jr., appeared for the complainant and Mr. A. H. Angstman appeared for the defendants. Mr. Albert Besancon appeared as amicus curiæ in behalf of the water users of Missoula County.

Case No. 3003, Mountain States Power Company vs. Commission, et al., was duly called for hearing on the order to show cause why an interlocutory injunction should not issue herein, and on the defendants' motions, this day filed, to dismiss the complaint and to dissolve the temporary restraining order herein. Mr. E. G. Toomey and Mr. H. H. Cleland appeared for the complainants and Mr. A. H. Angstman and Mr. Al Hansen appeared for the defendants.

Case No. 3004, Mountain States Power Company vs. Commission, et al., was duly called for hearing on the order to show cause why an interlocutory injunction should not issue herein, and on the defendants' motions, this day filed, [fol. 48] to discuss the complaint and to dissolve the temporary restraining order herein. Mr. E. G. Toomey and Mr. H. H. Cleland appeared for the complainant, and Mr. A. H. Angstman and Mr. F. F. Haynes appeared for the defendants.

Mr. Walter T. Bleick and Mr. Jos. Flaherty acted as court reporters.

Thereupon, on motion of its counsel, the complainant in case No. 1522, Montana Power Company vs. Commission, et al., was granted leave to amend its complaint, by interlineation, as follows: on page 20, line 15, change the figures $148,332.57 to $101,204.00, and on page 20, line 30, change the figures $1,287,792.00 to $1,278,792.00.

Thereupon counsel for complainant in said cause filed and presented to the court an affidavit in triplicate, correcting certain figures in the affidavits of F. M. Kerr and

J. R. Thomas heretofore filed therein; and in said cause counsel asked that the record show that the complainant now presses, reiterates and renews its motion and application for interlocutory injunction.

Thereupon, by agreement of all parties, expressed in open court, and it appearing that the same or like questions are involved in all three of said causes, court directed that they be heard and presented together at this time.

Thereupon said causes were duly heard, argued and submitted, and by the court taken under advisement, each side being granted twenty days in which to prepare, serve and file written arguments and briefs, such time to run concurrently.

At the close of his argument, Mr. Angstman, counsel for the defendants, asked that said defendants, in the event it becomes necessary, be granted ten days after final decision in which to answer, and it was so ordered.

Mr. Besancon, for the water users, requested that, in the event the court retains jurisdiction, he be allowed to intervene and file an answer in case No. 1522, Montana Power [fol. 49] Company vs. Commission, et al., when heard upon the merits.

Entered in open court at Missoula, Montana, October 8, 1935.

C. R. Garlow, Clerk.

[fol. 50] IN UNITED STATES DISTRICT COURT

Before Haney, Circuit Judge, and Baldwin and Pray, District Judges

MEMO DECISION—Filed February 3, 1936

PRAY, District Judge:

The foregoing suits in equity were brought to enjoin the enforcement of orders issued by the Public Service Commission of Montana, reducing the rates and charges fixed by complainants on the sale and distribution of natural gas, water and electricity on the ground that such reduction amounts to a taking of their property without due process of law, in violation of the federal constitution. Temporary restraining orders and orders to show cause

why interlocutory injunctions should not be granted, were issued.

The question at this time for our consideration arises on the motions to dismiss in all three cases for lack of jurisdiction. These motions were heard by the said Court at Missoula, on October 8th, 1935. Oral arguments were made and briefs submitted by counsel for the respective parties. Subsequent to the hearing and before the Court had passed upon the motions to dismiss, the complainant Montana Power Company and the defendant Public Service Commission came to an agreement as to the rates and charges to be adopted and entered into a stipulation for the dismissal of this case and submitted a form of order to carry it into effect, which has been approved and signed by all the Judges of said Court. The other two cases are still pending on the motions to dismiss. The legal questions involved in these motions are like those before a three Judge Court convened at Helena June 5th, 1935, wherein three Public Utility Companies brought suits against the Public Service Commission of Montana, seeking the same injunctive relief as in the instant cases, and upon the same [fol. 51] grounds, and were met with like motions to dismiss for lack of jurisdiction. An opinion in the aforesaid cases of June 5th, 1935, was filed in said Court on Nov. 20th, 1935, in which all three Judges concurred. We have considered that opinion in connection with the arguments and briefs of counsel in the present cases and agree in the main with the text and reasoning therein, and the authorities relied upon to support it. (Montana Power Co. v. Public Service Com., No. 1506, Butte Water Co. vs. Public Service Com., No. 1513, Fred A. Horning v. Public Service Com., No. 1514.)

Wherefore, having fully considered the questions in issue, and being duly advised, and good cause appearing therefore, the motions of the defendants to dismiss the two remaining suits for lack of jurisdiction are hereby granted.

All concur.

[File endorsement omitted.]

[fol. 52] OPINION BY THREE-JUDGE COURT

The Opinion of November 20, 1935, by Three-Judge Court, referred to and adopted in the Memo Decision next preced-

ing, is the opinion in Montana Power Co. v. Public Service Commission of Montana, et al, now reported in 12 Federal Supplement, 946.

[fol. 53] IN UNITED STATES DISTRICT COURT

APPLICATION FOR STAY PENDING APPEAL—Filed February 5, 1936

To the Honorable the Judges of the Above-entitled Court in the Above-entitled Cause:

Complainant hereby advises that it intends to appeal to the Supreme Court of the United States from the decree to be entered in this cause, in accordance with the decision herein, and hereby makes application for an order continuing the restraining order heretofore issued in said cause in force for a reasonable time, not exceeding thirty (30) days after the entry of said decree, within which to take and perfect said appeal, and further continuing said restraining order in force after said appeal is taken pending the hearing and decision of said case on said appeal by the Supreme Court of the United States, and that the decree to be entered herein provide accordingly; conditioned, if the court require, upon continuation of the impoundment heretofore ordered, established and in operation herein and continuance of the bond in the sum of Ten Thousand ($10,000.00) Dollars heretofore filed herein and supporting said impoundment "during the pendency of said temporary restraining order and the further order of the court in the above entitled cause", as in said bond recited, or such additional or other bond conditioned in such terms and in such sum as the court may order herein.

Complainant, by its solicitors, in support of said application, hereby represents and states that, unless said application is granted and said restraining order continued in force, the complainant will suffer irreparable injury as appears from the complaint in said cause on file herein.

Respectfully submitted, Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington. E. G. [fol. 54] Toomey, John W. Chapman, of Helena, Montana, Solicitors and Attorneys for Complainant.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF HEARING

No. 3003, Mountain States Power Company vs. Public Service Com., et al.

No. 3004, Mountain States Power Company vs. Public Service Com., et al.

The above entitled causes came on regularly for hearing this day on application of plaintiff for stay pending appeal, Mr. E. G. Toomey and Mr. Hance H. Cleland appearing for the Plaintiff in each case, and Mr. F. F. Haynes appearing for the defendants.

Thereupon Mr. John Ford was sworn and testified for plaintiff, and the court after hearing the arguments of counsel for each side, ordered the matter submitted, each side being granted ten days for briefs.

Entered in open court at Great Falls, Montana, March 6th, 1936.

C. R. Garlow, Clerk.

[fol. 56] IN UNITED STATES DISTRICT COURT

ORDER DISSOLVING INJUNCTION AND DENYING MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL—Filed April 9, 1936

This court has heard and considered the application for a stay order pending appeal in the above entitled causes, and likewise the evidence and briefs submitted. We have heretofore concurred in an opinion filed herein that this court is wholly without jurisdiction and have ordered the dismissal of said causes for that reason, and have endeavored to point the way to a plain, speedy and efficient remedy in the State Courts. No effort has been made on the part of complainants to avail themselves of the remedy proposed by this court that has come to our attention. If the court were now to grant the stay requested the operation of the decree of dismissal would be postponed for a year or more, and to that extent would be of no avail and would result in continuing the injunctive relief which we have heretofore denied for the reason that this court was without jurisdic-

tion to grant it in the first instance. The practical effect would be to nullify the decree of dismissal for lack of jurisdiction. The court does not consider the grounds alleged of such pressing importance as to warrant the continuance of the injunction, and, accordingly, good cause appearing therefor, the injunction aforesaid is hereby dissolved and the motion for a stay of proceedings pending appeal is denied.

Bert E. Haney, Charles N. Pray, James H. Baldwin, Judges.

[File endorsement omitted.]

[fol. 57] IN UNITED STATES DISTRICT COURT

DECREE—Filed April 9, 1936

This cause came on to be heard on the 8th day of October, 1935, and was argued by counsel for the respective parties and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that the motion of the defendants to dismiss for lack of jurisdiction should be granted.

Wherefore, it is ordered, adjudged and decreed that the said action and the Bill of Complaint therein filed be, and the same hereby are dismissed and that defendants have judgment for their costs herein incurred in the sum of — Dollars.

Dated this 9th day of April, 1936.

Bert E. Haney, Charles N. Pray, James H. Baldwin, Judges.

[File endorsement omitted.]

[fol. 58] IN UNITED STATES DISTRICT COURT

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed April 17, 1936

To the Honorable the Statutory Three-Judge Court Herein, and to the Honorable Judges Thereof:

Considering itself aggrieved by the final Decree of Dismissal rendered and entered in the above entitled cause on

the 9th day of April, 1936, by the statutory court of three Judges convened herein, Mountain States Power Company, a corporation, complainant herein, hereby does appeal from said decree to the Supreme Court of the United States and prays that an order allowing appeal be entered herein and for an order fixing the amount of the bond thereon, and that citation be issued as provided by law and that a transcript of the record, proceedings, testimony and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, Washington, D. C., under the rules of said court in such cases made and provided.

ASSIGNMENT OF ERRORS

And the said Mountain States Power Company, complainant, assigns errors and abuses of discretion by said court in the record and proceedings in said cause as follows:

1. In refusing to grant an interlocutory injunction where the admitted allegations of the bill of complaint and the undisputed affidavits filed therewith clearly disclosed substantial, daily and continuing confiscation of complainant's property and that the damage complainant will suffer, if the Commission order is permitted to become presently effective, will be irreparable.

2. In holding in its decision that the State of Montana affords "a plain, speedy and efficient remedy at law or in [fol. 59] equity" in its courts within the meaning of the Johnson Act (Act of Congress of May 14, 1934; Judicial Code Section 24, 28 U. S. C. A. Section 41, Chapter 283, Section 1, 48 Stat. 775).

3. In holding that the Johnson Act divested the District Court of its jurisdiction in a confiscation case where the state statute denies stay or supersedeas pending final determination.

4. In sustaining the motion to dismiss for alleged lack of jurisdiction.

5. In refusing to issue the interlocutory injunction as prayed for.

6. In denying complainant a stay pending appeal to the Supreme Court of the United States.

7. In placing complainant to the hazard of severe and drastic penalties for failure to comply with said Commission order and submit to the confiscation of its property.

8. In failing to grant a stay pending appeal to the Supreme Court of the United States, requiring complainant to impound the difference between the existing and the reduced rates, and furnish a bond for the faithful compliance with such impoundment as has been done under the requirements of the preliminary restraining order.

PRAYER FOR REVERSAL

For which errors and abuses of discretion, the complainant prays that the said decree of the three-Judge statutory court dated April 9th, 1936, be reversed and a judgment ordered in favor of complainant directing said court to entertain jurisdiction of said cause on application for interlocutory injunction on the merits, and for costs.

Done and dated April 17, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington. E. G. Toomey, John W. Chapman, [fol. 60] of Helena, Montana.

Service of the foregoing Petition for Order of Appeal, Assignment of Errors and Prayer for Reversal and receipt of a true copy of each thereof on April 18th, 1936, is hereby acknowledged this 18th day of April, 1936.

Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; Al Hansen, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 61] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed April 17, 1936

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the final Decree of Dismissal made and entered on the 9th day of April, 1936 in

the above entitled suit by the three-Judge statutory court convened herein, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors and Prayer for Reversal, and, separately, Statement Particularly Disclosing the Basis of Appellate Jurisdiction in the Supreme Court of the United States to review the decree in question, pursuant to the statutes, and the rules of the Supreme Court of the United States, in such cases made and provided and it appearing that there was drawn in question the validity of a formal written order of the Public Service Commission of the State of Montana, purporting to fix the value of complainant's electric system in the Baker, Montana, district, and ordering reductions in the company's rates for electric service, and preliminarily the question of whether the State of Montana affords complainant a plain, speedy and efficient remedy in its courts, within the meaning of the Johnson Act, (Act of Congress, May 14, 1934; 48 Stat. 775; Chapter 283, 28 U. S. C. A., Section 41, (1) in the presence of Section 3906, Revised Codes, Montana, 1921) and that such petition is a proper petition for the issuance of an order allowing appeal:

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the final Decree of Dismissal of the three-Judge statutory court specially convened in the United States District Court for the District of Montana in this cause, as provided by law.

[fol. 62] It is further ordered that the Clerk of the Court appealed from shall prepare and certify a transcript of the record, testimony, proceedings, decree, stipulations, etc. in this cause and transmit the same to the Supreme Court of the United States as required by law and the rules of said court.

It is further ordered that the appellant, Mountain States Power Company, execute to the respondents, its bond with surety to be approved by the undersigned in the sum of One thousand dollars ($1,000) Dollars as security for costs on appeal and to be conditioned according to law.

Done and dated this 17th day of April, 1936.

Charles N. Pray, Judges.

[File endorsement omitted.]

[fols. 63-65] Bond on appeal for $1,000.00, approved and filed April 17, 1936, omitted in printing.

[fols. 66-69] Citation, in usual form, showing service on Raymond T. Nagle et al., filed April 18, 1936, omitted in printing.

[fol. 70] IN UNITED STATES DISTRICT COURT

STATEMENT OF EVIDENCE ON APPLICATION FOR STAY—Filed April 25, 1936

Be it Remembered, that the application by complainant for stay of entry of decree, and for stay after entry of decree pending appeal to and in the Supreme Court of the United States by complainant from the decree of dismissal entered herein, came on regularly for hearing on the 6th day of March, 1936, Honorable Charles N. Pray, one of the Judges of the three-Judge court herein, presiding, Hance H. Cleland of Olympia, Washington, and E. G. Toomey of Helena, Montana, appearing as counsel for complainant, and Al Hansen, of Forsyth, Montana, appearing as counsel for defendants, and thereupon the following proceedings were had and done, and the following evidence received:

COLLOQUY

The Court: Are you ready to proceed in this matter, gentlemen?

Mr. Toomey: We are, Your Honor, at this time. The decision, as your Honor knows came down February 3rd, and on February 5th the Complainant filed application for a stay, and your Honor subsequently notified us that the application was referred to the other members of the special Court.

This morning has been set for taking proof and any argument which the Court might desire in connection with the application.

The Court: This is the application for a stay.

Mr. Toomey: Yes, your Honor.

The Court: On your application showing any reasons you may have which you think are sufficient to entitle you to a

stay. Have you any officer or some person who can tell the circumstances? I would——

Mr. Toomey: Yes, I would like to have those witnesses offer testimony through Mr. Cleland whom I heretofore presented to the Court as counsel in this case.

[fol. 71] The Court: Judge Haney, one of the members of the Court will be here on a three Judge Court next week, Tuesday or Wednesday, and a few days ago he mentioned this matter. He said, I wish you could dispose of it while I am up there; as long as we are involved in this hearing I did not like to postpone this and make you come again; it would make it very inconvenient. I thought perhaps you might take the testimony this morning and have it transcribed and then when Judge Haney comes we can consult together about it. You may proceed, gentlemen:

JOHN FORD, a witness called and sworn on behalf of complainant, testified as follows:

My name is John Ford; I am Assistant Secretary of the Mountain States Power Company, the complainant in this case. I was a witness in the hearings before the Public Service Commission in both the Baker and Forsyth cases. I am familiar with the books of record and accounts of the Mountain States Power Company, and with the Commission's orders as to valuations and rates in the Baker case and in the Forsyth case. I am referring to the Baker case alone. The Baker system is located in Fallon and Custer Counties, Montana, and serves the towns of Baker, Ismay and Plevna. It is not physically connected with the other company property, and it is operated as a separate and distinct system, and all records are maintained separately in this district, separate and apart from all records of the rest of the company's property. The books, records and accounts of the company are kept in accordance with the official classification of accounts as prescribed by the Public Service Commission of Montana, and this is true with respect to the Baker district.

The following valuations were presented at the Commission hearing on the Baker, Montana, property. The book cost as of December 31, 1934, exclusive of working capital, [fol. 72] materials and supplies, and approximately some 50% of going valuation was $152,712.00. The book cost as determined by the Commission's own auditor in 1933 was

$152,697.00. The book cost including going valuation, working capital, materials and supplies, but with the steam plant eliminated, was $113,580.00. The reproduction cost, new, as of December 31, 1934, which was based on a detailed inventory and appraisement, $156,166.00. Reproduction cost less depreciation as of December 31, 1934, $137,686.00. The assessed valuation for tax purposes for the year 1935, I use the year 1935 because at the Commission's hearing, only Fallon County was mentioned with a valuation of $94,242.00, whereas the assessed valuation for the entire system in the Baker district is $106,307.00. The valuation as found by the Commission and as stated in their order is an amount "not to exceed $55,000.00". In other words, the valuation of the Commission was approximately one-half of the company's assessed valuation for tax purposes.

Had the existing, or old rates, continued in force throughout the entire year 1935 in the Baker district, the gross revenue would have been $35,194.00. The operating expenses in the Baker district for the year 1935 were $36,001.00, resulting in a deficiency in red figures of $807.00; a net loss instead of a net income. That was the situation under the rates which were in effect before the Commission's order was made. There would be no return. There would be a return of .32 of one per cent on the assessed valuation for tax purposes in the red.

The rate of return on reproduction cost less depreciation, as of December 31, 1934, would be .59 of one per cent in the red.

If the reduced rate had been in effect during the entire year, 1935, the gross revenue would have been $23,868.00. That would have been a reduction in revenue of $11,326.00. Expressed in terms of percentage, this reduction would be 32.18%. As I testified, the operating expenses for the [fol. 73] Baker district during the year 1935 were $36,001.00, and the gross revenue under the new rate would be $23,868.00, resulting in a deficit of $12,133.00. In other words, the gross revenue would be less than the amount of operating expenses by $12,133.00.

There are 769 customers in the Baker District as of December, 1935. The average difference in customers bills per year as between the existing or old, and the reduced rates, including power customers and other large customers, would be $14.74 per customer per year. That would be an average difference to customers of $1.23 per month.

The reductions to the company would be $11,326.00 per year, or $944.00 per month, or $31.00 per day.

The old, or existing rates, have been in effect since April first, 1929, when they were put into effect by order of the Commission.

The company has impounded in this court, for the Baker district, the amount of $4,955.94. If we are denied a stay the company would, in order to comply with the decree, have to refund this amount, $4,955.94, and forego $944.00 per month, or $31.03 per day. In addition to this loss of earnings the company would have to amortize approximately $9,700.00 per year for ten years in order to charge off the books the difference between the Commission's valuation and the book cost. If denied the stay, the company would have to refund the impounded money to 769 different customers, in comparatively small amounts. Assuming that the company was successful in its appeal, in my opinion it would not be possible or practical for the company to recover the refunds from 769 customers, for various reasons; one, people are constantly moving away out of the system. Two, there would be such a multiplicity of suits for such small amounts that it would be impractical. Three, public relations would be entirely destroyed. Four, the expense of approximately 769 suits for small amounts would be prohibitive, and the company, indeed, as a whole, would [fol. 74] in my opinion, be insane to even attempt such a procedure as to attempt to recover the small amounts from approximately seven hundred sixty nine customers. In other words, it would be suicidal for the company to undertake to recover the considerably small amounts from such a large number of customers.

Mr. Cleland: I think, your Honor, we have covered the situation as we see it.

Mr. Haynes: No cross examination.

The Court: I see your point. You better make an argument, and have it taken down for the record.

Wherefore, complainant and appellant prays that the above statement of evidence be settled, approved and allowed by the above entitled court as a true, full and complete statement of all evidence taken and given on the ap-

plication for stay, for use on complainant's appeal to the Supreme Court of the United States.

Done and dated this 18th day of April, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington; E. G. Toomey, John W. Chapman, of Helena, Montana, Counsel for Appellants.

Lodged with Clerk April 20, 1936. C. R. Garlow, Clerk.

[File endorsement omitted.]

[fol. 75] IN UNITED STATES DISTRICT COURT

STIPULATION APPROVING STATEMENT OF EVIDENCE—Filed April 22, 1936

It is hereby stipulated and agreed, by and between the undersigned, Solicitors and Attorneys of record for complainant and appellant, and the undersigned, Solicitors and Attorneys of record for defendants and appellees, that the proposed statement of evidence on application for stay, lodged with the clerk of the above entitled court on April 20th, 1936, by the complainant, is agreed to as a correct statement under paragraph B of equity rule 75, and, further, that the said statement may be approved by the above entitled court, or a Judge thereof, without further notice.

Done and dated this 21st day of April, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington; E. G. Toomey, John W. Chapman, of Helena, Montana, Solicitors and Attorneys for Complainant. Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; Al Hansen, Solicitors and Attorneys for Defendants.

[File endorsement omitted.]

[fol. 76] IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE—Filed April 25, 1936

On this 25th day of April, 1936, came on for consideration the matter of the approval of the Statement of Evidence lodged herein by complainant and appellant on April 20th, 1936, and it appearing to the Court that the ten days' notice of the Lodgment and of the hearing on complainant's application for Approval of said Statement has been given to defendants and their counsel as required by Equity Rule Seventy-Five (75); and it further appearing that the parties have heretofore filed herein their written stipulation agreeing that said Statement of Evidence is a correct Statement under said rule and may be approved without further notice;

It is ordered by the Court that the said statement of evidence on application for stay be, and the same is hereby approved as part of the record herein, for the purpose of complainant's appeal to the Supreme Court of the United States.

April 25, 1936.

Charles N. Pray, Judge.

[File endorsement omitted.]

[fol. 77] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING PARTY DEFENDANT—Filed April 23, 1936

Upon the stipulation of the parties and the facts requiring:

It is ordered: That Elmer Holt, as Governor of the State of Montana, be substituted as a party defendant herein, in lieu of F. H. Cooney, as Governor of the State of Montana, deceased since commencement of this suit.

Done and dated April 23rd, 1936.

Charles N. Pray, United States District Judge.

[File endorsement omitted.]

[fol. 78] IN UNITED STATES DISTRICT COURT

STIPULATION FOR CONTENTS OF TRANSCRIPT OF RECORD ON APPEAL—Filed April 22, 1936

It is hereby stipulated and agreed by and between the undersigned attorneys of record for plaintiff and appellant and defendants and appellees, respectively, that the papers on record which shall constitute the Transcript of Record on Appeal to the Supreme Court of the United States herein shall consist of the following:

1. Bill of Complaint and all Exhibits thereto attached.
2. Affidavits of John Ford and Howard F. Lill.
3. Order to Show Cause and Temporary Restraining Order.
4. Motion to Dissolve Temporary Restraining Order.
5. Motion to Dismiss Bill of Complaint.
6. Minute Entry on Motion for Interlocutory Injunction and Submission of Case on such Motion.
7. Memo Decision by Three-Judge Court on Feb. 3, 1936.
8. Opinion by Three-Judge Court on November 20, 1935 by reference to citation in 12 Fed. Supp. 946.
9. Application for Stay Pending Appeal.
10. Statement of Evidence and Stipulation and Order Thereon.
11. Minute Entry of March 6, 1936, on Submission of Stay Application.
12. Order Denying Application for Stay and Dissolving Temporary Restraining Order.
13. Decree of Dismissal.
14. Petition for Appeal, Assignment of Errors and Prayer for Reversal.
15. Statement of Basis of Appellate Jurisdiction (separately certified).
16. Order Allowing Appeal.
17. Copy of Bond on Appeal.

[fol. 79] 18. Citation on Appeal and Service thereon.

19. Statement by appellees under Paragraph 3 of Rule 12 of United States Supreme Court Rules and service thereof.
20. This stipulation.

And the Clerk of the above-entitled court is requested to forward to the Clerk of the Supreme Court of the United States, at Washington, D. C. a transcript containing only the papers designated herein.

This Stipulation is made and entered into pursuant to Rule 10 and Paragraph 9 of Rule 13 of the rules of the Supreme Court of the United States.

Dated this 21st day of April, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washintgon; E. G. Toomey, John W. Chapman, of Helena, Montana, Attorneys for Appellant. Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; Al Hansen, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 80] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed April 28, 1936

Comes now the appellant and adopts its Assignments of Error and Specification of Abuses of Discretion as its Statement of the Points to be Relied Upon, and states that the whole of the record, as transmitted and filed, is necessary for the consideration of the case.

Done and dated at Helena, Montana, April 25th, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington; E. G. Toomey, John W. Chapman, of Helena, Montana, Attorneys for Appellants.

[fol. 82] Service of the above and foregoing statement is hereby admitted and receipt of a true copy thereof ac-

knowledged this 25th day of April, 1936. Appellees consent to hearing on record as made and designated above.

Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; Al Hansen, Attorneys for Appellees.

[fol. 83] [File endorsement omitted.]

Endorsed on cover: File No. 40,510. Montana D. C. U. S. Term No. 38. Mountain States Power Company, appellant, vs. Public Service Commission of Montana, et al. Filed April 23, 1936. Term No. 38, O. T., 1936.

(7863-C)

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IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF MONTANA

IN EQUITY.

No. 3003

MOUNTAIN STATES POWER COMPANY,
A CORPORATION,

vs. *Complainant,*

PUBLIC SERVICE COMMISSION OF MONTANA ET AL. AND THE BAKER CIVIC LEAGUE OF BAKER, MONTANA,

Defendants.

STATEMENT OF JURISDICTION UNDER AMENDED RULE 12.

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, as amended by Order of May 31, 1932, the above named complainant and appellant files this its separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the Decree of Dismissal appealed from herein, as follows:

(a)

The statutory provisions believed to sustain the appellate jurisdiction are Sections 238 and 266 of the Judicial Code as amended (28 U. S. C. A., Sec. 345 (3) and Sec. 380).

(b)

The Statute (Order) of the State, the Validity of Which is Involved.

This suit is one involving the validity of a formal written order of the Public Service Commission of the State of Montana, purporting to fix the value of complainant's electric system in the Baker, Montana district, and ordering drastic reductions in the company's rates for electric service (R. 7, 20).

The Commission's order is dated September 13, 1935, requires the filing of the reduced rates on or before September 25, 1935 and makes such reduced rates retroactively effective as of September 1, 1935.

The lowest figure evidentiary of value, in the record before the Commission, was $94,242.00 (R. 31, 72), being the assessed value for tax purposes, of a *portion* only of the electric system in question. The undisputed cost of reproduction new, less accrued depreciation, comparable to the value fixed by the Commission, was $113,580.30 (R. 8, 10, 12, 72).

The Commission, in its order, found the "fair present value" of said electric property "does not exceed the sum of $55,000" (R. 22).

The Commission found the 1934 annual gross revenue from this system under existing rates, to be $32,263.80 and the total operating expenses, including taxes and annual depreciation expense, to be $27,448.77 (R. 22, 23).

The application of the reduced rates ordered by the Commission, it is admitted, will reduce complainant's annual gross revenue from $32,263.80 to $23,146.80—an annual reduction of $9,117.00 (R. 11, 32).

Under *existing* rates the net return to the complainant in the Baker district would not exceed 2.55% upon a rate base of $113,580.30 (R. 11, 33).

Under the *reduced* rates the operating expenses would exceed the gross revenues by $4,301.97 per year.

This clearly constitutes substantial, daily and continuing confiscation.

(c)

The date of the decree sought to be reviewed herein is April 9, 1936, and the date upon which the application for appeal is presented is April 17, 1936.

(d)

Nature of the Case and Rulings of the Court Bringing the the Case Within the Jurisdictional Provisions Relied Upon.

Upon receipt of the Commission order hereinabove referred to, the complainant, on September 22, 1935, filed with the State Commission a petition for rehearing and stay of its order, bringing to the attention of the Commission that the application of the reduced rates would result in the confiscation of complainant's property (R. 26). On September 23, 1935, the Commission entered a formal order denying said petition (R. 28).

Thereupon complainant commenced this suit in equity on September 25, 1935 to restrain the enforcement of the order, applied for a temporary restraining order and interlocutory injunction and moved to convene a three judge court, which later heard the application for interlocutory injunction.

A temporary restraining order and order to show cause why interlocutory injunction should not issue, was signed by District Judge Pray on September 25, 1935. Under this order the complainant was required to impound with the court the difference between the existing and the reduced rates and furnish proper bond to guarantee compliance therewith (R. 39, 42). The complainant filed the bond as

required (R. 42) and has impounded and is continuing to impound, with the court the said difference in rates.

The bill of complaint alleged: (a) diversity of citizenship (R. 2, 4, 6), (b) the requisite amount in controversy (R. 6), (c) that the laws of Montana prohibit the courts of that State from issuing an injunction *pendente lite* to restrain the enforcement of the Commission rate order (R. 14), (d) that complainant had no plain, speedy or efficient (adequate) remedy at law or in equity in the courts of the State, nor otherwise except by resort to the federal district court to protect it against the confiscation of its property (R. 14), (e) that enforced compliance with the Commission order resulted in immediate, daily, substantial and continuing confiscation in violation of the 14th Amendment to the Constitution of the United States, (R. 13, 14, 15, 34), and (f) that the laws of Montana provided severe, recurring and cumulative penalties for failure to comply with the order, impose upon the attorney general of the State the duty to and that he would, enforce such penalty provisions (R. 14, 15).

The defendants filed no answer and did not otherwise controvert the allegations of the complaint or counter in any respect the affidavits filed in support of the application for temporary restraining order. The defendants filed only a demurrer and motion to dismiss (R. 45, 46).

The suit was on October 8, 1935, upon argument and brief, submitted to the three judge court upon the jurisdictional questions raised by the demurrer and motion to dismiss (R. 47, 49).

On February 3, 1936, the three judges filed a memorandum opinion granting the motion to dismiss the suit for lack of jurisdiction (R. 50-51). In this memorandum opinion the court does not discuss the questions involved, but disposes of this suit by the following:

> "The legal questions involved in these motions are like those before a three judge court convened at

Helena June 5th, 1935, wherein three Public Utility Companies brought suits against the Public Service Commission of Montana, seeking the same injunctive relief as in the instant cases, and upon the same grounds, and were met with like motions to dismiss for lack of jurisdiction. An opinion in the aforesaid cases of June 5th, 1935, was filed in said court on Nov. 20th, 1935, in which all three judges concurred. We have considered that opinion in connection with the arguments and briefs of counsel in the present cases and agree in the main with the text and reasoning therein, and the authorities relied upon to support it. (*Montana Power Co.* v. *Public Service Com.*, No. 1506, *Butte Water Co.* v. *Public Service Com.*, No. 1513, *Fred A. Horning* v. *Public Service Com.*, No. 1514.)'' (R. 50-51-52.)

The complainant, on February 5, 1936, filed an application for stay, *i.e.*, to continue the temporary restraining order in effect, under bond and conditions to be prescribed by the court, pending appeal to the Supreme Court of the United States (R. 53-54). This application was heard before one of the Judges of the court (Judge Pray) at Great Falls, Montana, on March 6, 1936. Complainant at the hearing on application for stay presented evidence through witnesses in support of its application. Defendants presented no evidence (R. 55, 70-74). The record thus made was transcribed and copies, together with briefs of counsel, forwarded at the direction of Judge Pray to the other members of the Three-Judge Court, viz., to Hon. Bert E. Haney, Circuit Court of Appeals for Ninth Circuit, San Francisco, California, and Hon. James H. Baldwin, U. S. District Court, Montana, the latter then presiding pursuant to assignment in the United States District Court for the District of Arizona (R. 71). On April 9, 1936, the application for stay was by order of the three Judges denied and the

temporary restraining order dissolved (R. 56). Decree of dismissal of the suit was filed on April 9, 1936.

Between October 8, 1935, when the suit was argued and submitted to the three-Judge court on application for interlocutory injunction and February 3, 1936, when the court filed its memorandum opinion granting defendants' motion to dismiss for lack of jurisdiction, the time within which complainant might commence an action against the commission in the State courts to vacate its valuation and rate order had expired. The time limitation on such an action is ninety (90) days from date of the Commission's order (Section 3906, Revised Codes of Montana, 1921) of September 13, 1935. This same statute, hereinafter discussed, expressly denies complainant a stay of the Commission's order pending such action.

The bill of complaint, the material allegations of which are admitted by the demurrer and motion to dismiss, discloses that the uncontradicted evidence as to elements of value as of December 31, 1934, in evidence before the Commission were as follows:

Cost of reproduction new (paragraph XI, R. 7, 34)	$156,166.00
Cost of reproduction new less accrued depreciation (paragraph XI, R. 7, 34)	137,686.00
Book cost (paragraph XI, R. 8, 34)	152,712.01

The bill of complaint alleges that this undisputed evidence of value was given no consideration by the Commission (paragraph XI, R. 8) and that no evidence was offered by any other party or person with respect to these elements of value (R. 8).

The affidavits accompanying the bill of complaint and filed in support of the application for preliminary restraining order disclose that there was offered in evidence before the Commission a statement showing the amount invested

in property and plant in this district as found by the Commission's own auditor in 1933, amounting to $152,697.78 (R. 31) and that the assessed value of the company's property in a portion only of the district involved was $94,242.00 (R. 31).

Each of the above valuation figures includes a steam plant, the only item of property disallowed by the Commission (R. 22). As an example of the extent and effect of such disallowance, this item (steam plant) with respect to the "Cost of Reproduction, Depreciated," amounts in round figures to $24,100.00 (R. 38). The Cost of Reproduction Depreciated is therefore hereinbefore stated (herein p. 5-a) as $113,580.30, to be comparable with the Commission finding of value of "not to exceed $55,000.00." Under the Commission's order the same disallowance (approximately $24,100.00) would be deducted from the above figures "Reproduction Cost, New," "Book Cost," etc.

In the face of this uncontradicted evidence with respect to value the Commission fixed the rate base at "not to exceed $55,000."

As shown by said affidavits accompanying the bill of complaint, the order directs an average reduction in rates of approximately 32% and reduces the annual gross revenue from $32,263.80 to $23,146.80, or an annual reduction of $9,117.00 (R. 32); that under the existing rates and on the basis of 1934 business (the last available full year) the net return to the complainant in the Baker district did not exceed 2.55% upon a rate base or value of $113,580.30 (R. 33); that applying the reduced rates to the 1934 business the complainant would suffer an actual out-of-pocket loss of $4,433.24 per year (R. 33) without any allowance whatsoever by way of return on the property.

This makes an admittedly clear case of substantial, daily and continuing confiscation.

Complainant filed its suit in the United States District Court for Montana and presented its application for interlocutory injunction, because of the provisions of Section 3906, Revised Codes of Montana 1921, which reads insofar as material here, as follows:

> "No injunction shall issue suspending or staying any order of the Commission except upon application to the court or judge thereof, notice to the Commission having been first given and hearing having been had thereon; *provided, that all rates fixed by the Commission shall be deemed reasonable and just and shall remain in full force and effect until final determination by the courts having jurisdiction.*" (Italics ours.)

This section clearly denies an injunction *pendente lite* against a rate reduction order of the Commission.

While no direct challenge to the constitutionality of the foregoing statute has been presented to the Supreme Court of Montana, that court has on more than one occasion given consideration to and applied the proviso above quoted.

The section was quoted in *Billings Utility Co.* v. *Public Service Commission*, 62 Mont. 1, 203 Pac. 366 (1921), and this comment made:

> "The rates fixed, as by the statute directed, are *prima facie* lawful, can be attacked in court on the sole ground that they are unlawful or unreasonable, shall be deemed reasonable and just until final determination by the courts and the burden of proof rests on the party antagonizing the order."

The section was again considered in *State ex rel. Public Service Commission* v. *Great Northern Utilities Co.*, 86 Mont. 442, 284 Pac. 772 (1929), and this comment made:

> "the statute prohibits the court in such an action *from issuing an injunction pendente lite* and declared that the 'rates fixed by the Commission shall be deemed reasonable and just, and shall *remain in full force and*

effect until final determination by the courts having jurisdiction (Secs. 3905 and 3906, Rev. Codes 1921), and Sec. 3911 Id., specifically authorizes mandamus proceedings to compel obedience to the orders issued." (Italics ours.)

The Board of Railroad Commissioners of Montana is, ex officio, the Public Service Commission of Montana (Section 3880 Revised Codes of Montana, 1921). In the act creating the parent Board there is found Section 3809 Revised Codes of Montana, 1921 (formerly Section 4390 Revised Codes, 1907) reading, in part, as follows:

"That *until the final decision* in any such action the classification, rate, toll, charge, regulation or *order of the board* affecting rates or charges *shall be deemed to be final and conclusive:* And provided, further, that in any action, hearing or proceeding in any court, the classification, rate, tolls, charges, regulations and orders made, fixed and established by said board shall prima facie be deemed to be just, reasonable and proper." (Italics ours.)

These provisions were directly examined by the Supreme Court of Montana, in *State ex rel. Board of Railroad Commissioners* v. *District Court,* 53 Mont. 229, 233, 163 Pac. 115 (1917), and this conclusion expressed:

"Provisos to the same effect are found in section 4391. They are not expressed in the most apt and appropriate terms; yet it is obvious, we think, that it was the purpose of the legislature in enacting the first to *restrict the power of the court to disturb or suspend the operation of an order of the board promulgating a rate or charge until final judgment;* while by the second it was the purpose merely to declare the rule by which the evidence must be weighed with reference to this kind of order as well as any other which the board may promulgate. *The effect* of the first *is to take from the court all power of control over any or-*

der relating to rates and charges except by final judgment. This necessarily deprives a railroad *company* as well as the shipper, *of the right to invoke,* and *prohibits the court from issuing a preliminary injunction in this behalf."* (Italics ours.)

The defendants, in support of their demurrer and motion to dismiss, contended the Johnson Act, *post,* removed from the Federal district courts, jurisdiction in suits such as the one at issue, and further contended the decision in *Porter* v. *Investors Syndicate,* 286 U. S. 241, 76 L. Ed. 1226, 52 S. Ct. Rep. 617, was controlling of the issue.

The complainant contended that: (a) the Johnson Act did not remove the jurisdiction but specifically retained it in the Federal district court, where with respect to rate cases, admittedly involving confiscation, the State law did not provide a "plain, speedy and efficient remedy" to protect against substantial, daily and continuing confiscation; (b) the laws of Montana did not provide such a remedy—but on the contrary, such laws expressly deny the complainant an injunction *pendente lite;* (c) the *Porter* case, *supra,* is not applicable because it was based upon other and dissimilar statutes, *i.e.,* (1) statutes giving the State court legislative powers or functions and making the rule in the *Prentis* case applicable, and (2) supersedeas was available in the *Porter* case under the general appellate and procedural statutes of the State; (d) neither of these grounds was present in the instant suit; and (e) the rule announced in *Pacific Telephone and Telegraph Co.* v. *Kuykendall,* 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553, is controlling of the issue presented.

The Johnson Act (Act of Congress, May 14, 1934—48 St. at L. 775, Chap. 283, 28 U. S. C. A. Sec. 41 (1) provides as follows:

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of

any suit to enjoin, suspend, or restrain, the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, *and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.*" (Italics ours.)

By the italicized proviso, the Johnson Act specifically retains jurisdiction in the Federal courts to grant injunctive relief in confiscation cases such as that here presented. In fact, the constitutionality of the Johnson Act itself would be in serious doubt were it not for this saving clause.

Corporation Commission of Oklahoma et al. v. *Cary, Trustee*, — U. S. —, 80 L. Ed. —, 56 Sup. Ct. Rep. 300.

Corporation Commission of Oklahoma et al. v. *Cary, Trustee*, 9 Fed. Supp. 709.

We do not believe it was the intention of either the framers of the Johnson Act nor of the Congress that that Act would deny to a citizen, his rights under the federal constitution nor his resort to this court in situations such as are presented by the instant suits wherein it is so apparent the state process is inadequate to afford relief.

Probably the best evidence of this is a statement of the Honorable John E. Benton, of Washington, D. C., General Solicitor of the National Association of Railroad and Utility Commissioners, an organization which embraces within its membership the members of the State Public Service

Commissions. As disclosed by the printed report of the hearings of the Judiciary Committee of the House of Representatives of the 73rd Congress, Second Session, Mr. Benton appeared on February 27, 28 and March 1, 1934, and supported this bill as the representative of the State Commissions. (U. S. Government Printing Office Document 45,740, at p. 216-217), Mr. Benton testified as follows:

> "In the brief filed on behalf of the Commonwealth Edison Co., the Peoples Gas Light Co. of Chicago, and various other utilities, the following assertion was made on page 6:
>
> " 'The fact is, as brought out later in this memorandum, that adequate relief against confiscation cannot, under the statutes of many, and perhaps most, States, be obtained by a utility during the process of appeal from a commission through the state courts.'
>
> "The later statement in the brief, referred to in the quotation just made, appears on page 8:
>
> " 'The State Courts cannot, except in a few instances where they are given legislative authority in rate cases, grant by injunction any affirmative relief to the utility from the confiscatory order of the commission.'
>
> "Similar statements have been made during the hearing by other utility counsel.
>
> * * * * * * *
>
> "Perhaps the shortest answer to make to this astonishing assertion of utility counsel, however, is that *by the plain terms of this bill, it will not be applicable* in any state *where the courts* of *the state do not exercise jurisdiction to restrain confiscation.* The bill is to apply only in states where 'a plain, speedy and efficient remedy' may be had in the state courts.
>
> "The construction of the bill, if it becomes a law, and the determination whether the facts in any case, under the law as construed, are such that the act ap-

> plies, *will be for the Federal District Courts,* with appeal to the United States Supreme Court. *The right to be protected against confiscation of property is a constitutional right.* The act recognizes that a utility suffering violation of any constitutional right is entitled to a speedy remedy, and reserves jurisdiction to the Federal courts to protect it, *if in any state,* the state courts are *disabled to protect it.* In whatever states, if any, the state courts in fact are without power to give a 'plain, speedy and efficient remedy,' this act will not apply; and *the jurisdiction of the United States district courts, as now existing, will continue to be exercised.*" (Italics ours.)

It is complainant's position the Federal Court has jurisdiction of the instant suit by virtue of the italicized proviso in the Johnson Act above, for the reason that Section 3906, Rev. Codes of Montana 1921, denying as it does a stay or supersedeas pending final determination in a confiscation case—specifically denies to the complainant a "plain, speedy and efficient remedy," in the courts of the State, to protect it against such confiscation of its property.

The defendants, further contended that Section 3906 Montana Code 1921, was unconstitutional, stated they would so concede, and suggested complainant could secure injunctive relief under the general statutes of the State.

The three judge court apparently agreed with this argument, for it states (in its opinion of November 20, 1935, R. 50-52) that the decision in *Porter* v. *Investors Syndicate, supra*

> (a) "*is a plain direction to hold such a law* as we have been considering in Section 3906, denying a supersedeas or stay, *unconstitutional* and void, as violative of the provisions of the Constitution of the United States, for the reason, that it would permit the taking of the property of the complainant without due process of law, which is contrary to the Fourteenth Amendment" (R. 52).

and

(b) "if the Supreme Court were to write a decision for our guidance in the interpretation of Section 3906, considered in connection with the Johnson Act, it could not do so more pointedly and effectually than it has done in the *Porter* case, and it cites the identical state statute to which recourse could be had by complainants for a stay of the commission's order, viz.: Section 9243, which reads: 'Injunctive Order—When Granted: An injunctive order may be granted in the following cases:

" '1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such relief, or any part thereof necessary in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;'

" '2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff.' "

We respectfully differ with the three judge court in their interpretation of the *Porter* case, *supra,* and the application of the statutes of Montana referred to in that case.

The *Porter* case is not controlling here and the statutes in question in that case were materially different from Section 3906 referred to in the instant suit.

In the first place, the *Porter* case was a *Prentis* case, the state court having authority to "set aside, modify or confirm" the order of the State Auditor—*Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67.

This is not a *Prentis* case—the State courts may only "vacate or set aside" Public Service Commission rate orders. (Section 3906 Montana Code 1921). In the second place, under the Montana statutes being considered in the *Porter* case direct provision was made for supersedeas or

stay under the general statutes of the State. (Secs. 4038 and 9243 as amended).

The statutes considered in the *Porter* case related to the powers and duties of another state officer (state auditor—ex officio Investment Commission) and had no relation to the statutes governing the Public Service Commission of Montana. In other words, the statutes considered in the *Porter* case are not the statutes applicable in the instant suit. As hereinafter discussed they gave to the courts of the state, powers upon review and authority with respect to stay, which were the exact opposite of the statute here in question.

In the *Porter* case, the Court was considering Sections 4038 and 9243, Montana Revised Codes, 1921.

Section 4038 Montana Revised Code, 1921, as amended by Ch. 194, Session Laws of 1931, is a part of Chapter 264, is known as the Blue Sky Law and is the Montana Act prescribing the powers, duties and functions of the State Auditor (ex officio Investment Commissioner) who revoked the Syndicate's license in the *Porter* case. Section 4038 which provides the appellate procedure from his determinations, reads in part as follows:

> "The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the District Courts of this State • • •."

Section 9243 referred to in the *Porter* case and in the opinion of the three judge court, relates to injunctions in equitable actions and is the general statute referred to in Section 4038. Neither Section 4038 nor 9243, *supra*, has any relation to the powers, duties or functions of the Public Service Commission of Montana. Section 9243 is quoted herein at p. 14.

The sole powers of the courts of Montana with respect to Public Service Commission orders, are found in Section

3906, *supra*. Section 3906 is complete in itself, both with respect to functions of the State court in its final determinations and with respect to supersedeas or stay. Neither Section 3906 nor any other Section of the Public Service Commission laws of Montana authorize or contemplate a resort to Section 9243, *supra*, or any other or general laws for appellate or injunctive relief pending appeal—the remedy is exclusive.

Neither do we agree with the three judge court that the decision in the *Porter* case is a "direction" to that court to hold Section 3906 unconstitutional. On the contrary, the Court in the *Porter* case, in discussing the meaning of Section 4038 of the Blue Sky Law, said:

> "We are persuaded to this view for the reason that it supports the constitutionality of the act, and we are bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality. *Bratton* v. *Chandler*, 260 U. S. 110, 67 L. Ed. 157, 43 S. Ct. 43. The construction thus adopted is consistent with the validity of the act, whereas that pressed upon us by the appellee would clearly render it unconstitutional.
>
> "Whereas ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co.* v. *Lewis*, 241 U. S. 440, 454, 60 L. Ed. 1084, 1098, 36 S. Ct. 637. *But where either the plain provisions of the statute* (*Pacific Teleph. & Teleg. Co.* v. *Kuykendall*, 265 U. S. 196, 203, 204, 68 L. Ed. 975, 980, 981, 44 S. Ct. 553) *or the decisions of the State court interpreting the act* (*Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353) *precludes a supersedeas or stay* until the legislative process is completed by the final action of the reviewing court, due process is not afforded, *and in cases where*

the other requisites of Federal jurisdiction exist recourse to a Federal court of equity is justified. (Italics ours.)

In *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 68 L. Ed. 975, 44 Sup. Ct. 553, the Supreme Court said (L. Ed., p. 981):

> "A litigant whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the State tribunals, may properly base his application for equitable relief on the *effect of the statute and the presumption of its validity,* and *is not required to establish* that the *State statute is not invalid under the State Constitution. Dawson* v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, 296, 65 L. Ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case."

In *Union Pac. R. Co.* v. *Weld County,* 247 U. S. 282, 287, 62 L. Ed. 1110, 1117, 38 S. Ct. 510, the Court said:

> "An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. *The question is purely one of State law,* and, so far as we are advised, the supreme court of the State has not passed on or considered it. *A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law.* On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, *the situation is not one in which cognizance of the present suit properly can be declined."* (Italics ours.)

The quoted language from Sec. 3906, *supra,* is and was a part of Chapter 52 of the 1913 Session Laws of Montana. Chapter 52 enlarged the functions of the Railroad Commission of Montana and created the Public Service Commission,

giving it jurisdiction with respect to the valuation and rates of electric and other utility companies, which it had not theretofore had or exercised.

Section 3880, Revised Codes of Montana, 1921, was Section 2 of said Chapter 52; Section 3880, in part, reads as follows:

> "The Board of Railroad Commissioners of the State of Montana shall be ex-officio the Public Service Commission hereby created, and for the purposes of this act shall be known and styled 'Public Service Commission of Montana.' * * * and in the name as above set forth, it may sue and *be sued in the courts* of the State and *of the United States.* * * *" (Sec. 2, Ch. 52, Laws '13.) (Italics ours.)

The quoted Sections (3880 and 3906) being parts of the same act, and not having been amended or repealed, argue strongly the Montana legislative intent (in 1913 and today, 1936) that a public utility should, at its election, have the right to proceed in either the State or Federal Court. Section 3880, *supra,* contains no provision that suits against the Commission in Federal court are limited to any particular class or character of suit or issue.

The Johnson Act, *supra,* was passed May 14, 1934. The regular session of the Montana legislature convened and adjourned during the early months of 1935, without amending or repealing either of these sections. (Montana Session Laws, 1935.)

These two State laws, one denying complainant an injunction *pendente lite* on appeal from an admittedly confiscatory rate order and the other authorizing the Public Service Commission to be sued in this Court compels the conclusion the legislature of Montana intentionally sought to supply a deficiency in Montana law (as measured by the Federal requirement of a plain, speedy and efficient remedy

in confiscation cases) by inviting resort to the Federal courts.

(e)

Cases Believed to Sustain Jurisdiction.

Pacific Telephone & Telegraph Co. v. *Kuykendall*, 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553;

Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353;

Union Pacific R. Co. v. *Weld County*, 247 U. S. 282, 62 L. Ed. 1110, 38 S. Ct. 510;

Dawson v. *Kentucky Distilleries, etc.*, 255 U. S. 288, 65 L. Ed. 638, 41 S. Ct. 272;

Love v. *Oklahoma Operating Co.*, 252 U. S. 331, 64 L. Ed. 596, 40 S. Ct. 338;

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527;

Truax v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124;

Atlantic Coast Line v. *Daughton*, 262 U. S. 413, 67 L. Ed. 1051, 43 S. Ct. 620;

Davis v. *Wakelee*, 156 U. S. 680, 39 L. Ed. 578, 15 S. Ct. 555;

Ohio Oil Co. v. *Conway*, 279 U. S. 813, 73 L. Ed. 972, 49 S. Ct. 256;

Corporation Com. of Oklahoma v. *Cary, Trustee*, — U. S. —, 80 L. Ed. —, 56 S. Ct. 300;

Corporation Com. of Oklahoma v. *Cary, Trustee*, 9 Fed. Supp. 709.

(f)

Matters in Which the Specially Constituted District Court of the United States Abused Its Discretion.

The District Court erred and abused its discretion in the following respects:

1. In refusing to grant an interlocutory injunction where the admitted allegations of the bill of complaint and the undisputed affidavits filed therewith clearly disclosed substantial, daily and continuing confiscation of complainant's property and that the damage complainant will suffer, if the Commission order is permitted to become presently effective, will be irreparable.

2. In holding in its decision that the State of Montana affords "a plain, speedy and efficient remedy at law or in equity" in its courts within the meaning of the Johnson Act (Act of Congress of May 14, 1934; Judicial Code Section 24, 28 U. S. C. A., Section 41, Chapter 283, Section 1, 48 Stat. 775).

3. In holding that the Johnson Act divested the District Court of its jurisdiction in a confiscation case where the State statute denies stay or supersedeas pending final determination.

4. In sustaining the motion to dismiss for alleged lack of jurisdiction.

5. In refusing to issue the interlocutory injunction as prayed for.

6. In denying complainant a stay pending appeal to the Supreme Court of the United States.

7. In placing complainant to the hazard of severe and drastic penalties for failure to comply with said Commission order and submit to the confiscation of its property.

8. In failing to grant a stay pending appeal to the Supreme Court of the United States, requiring complainant to impound the difference between the existing and the reduced rates, and furnish a bond for the faithful compliance with such impoundment as has been done under the requirements of the preliminary restraining order.

Respectfully submitted,

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Solicitors and Attorneys for
Mountain States Power Company.

April 17, 1936.

Endorsed: "Filed April 17, 1936. C. R. Garlow, Clerk, By H. H. Walker, Deputy."

FILED
SEP 11 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1936

No. 38

MOUNTAIN STATES POWER COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, et al,
Appellees.

APPELLANTS' BRIEF

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Dated August 27, 1936.

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IN THE

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No. 38

MOUNTAIN STATES POWER COMPANY,
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PUBLIC SERVICE COMMISSION OF MONTANA, et al,
Appellees.

APPELLANTS' BRIEF

Opinion Below

A District Court, specially constituted under Section 266 of the Judicial Code, as amended, (U.S.C.A. Title 28, Sec. 380) for the District of Montana, Billings Division, on February 3, 1936, rendered an opinion sustaining Appellees' motion to dismiss Appellants' suit, brought to enjoin as unlawful and confiscatory, a valuation and rate order of the Public Service Commission of Montana and seeking interlocutory and permanent injunctions against said order. The memo. opinion of the District Court appears at R. 38 and the

prior opinion of that court, adopted for disposition of the instant suit, is reported in 12 F. Supp. at p. 946. Thereafter, the court entered its decree dismissing the suit (R. 42) and the complainant has appealed therefrom.

Application for stay pending appeal was made to the lower court (R. 40) and was denied (R. 41). Application was then made direct to this court for such stay and on May 7, 1936, and after oral argument, this court issued its injunction restraining the order of the Public Service Commission here involved, pending determination of this appeal or until further order.

Statutes (and Order) Involved

(a) This suit is one involving the validity of a formal valuation and rate order of the Public Service Commission of the state of Montana, with respect to appellants' electric system in the Baker, Montana district. The order is too lengthy to insert here but is set out in full at R. 16.

(b) Section 3906 Revised Codes of Montana, 1921:

> "Action to set aside rates or charges fixed by commission. Any party in interest being dissatisfied with an order of the *commission* (Public Service Commission) fixing any *rate or rates*, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants, to *vacate and set aside* any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice, or service, fixed in such order,

is unlawful or unreasonable. The commission and other parties defendant shall file their answer to said complaint within thirty days after the service thereof, whereupon such action shall be at issue and stand ready for trial upon twenty days' notice to either party.

"All actions brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the court shall always be deemed open for the trial thereof, and the same shall be *tried and determined* as other civil actions; any party to such action may introduce evidence in addition to the transcript of the evidence offered to said commission.

"No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon; provided, that *all rates fixed by the commission shall be deemed reasonable and just, and shall remain in full force and effect until final determination by the courts having jurisdiction.*

"If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence, the commission shall consider the same, and may modify, amend, or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulation, practice, or service complained of in said ac-

tion, and shall report its action thereon to said court within ten days from the receipt of such evidence.

"If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify, or amend the same, such altered, modified, or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

"Either party to said action, within sixty days after service of a copy of the order or judgment of the court, may appeal or take the case up on error as in other civil actions. Where an appeal is taken to the supreme court of Montana, the cause shall, on the return of the papers to the higher court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar.

"In all actions under this act, the burden of proof shall be upon the party attacking or resisting the order of the commission to show that the order is unlawful or unreasonable, as the case may be." (Italics and matter in parenthesis ours).

(c) The Johnson Act (Act of Congress, May 14, 1934, U.S.C.A., Title 28, Sec. 41 (1), added to Sec. 24 of the Judicial Code a proviso reading as follows:

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political

subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, *and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.*" (Italics ours.)

(d) Sec. 4038 Revised Codes of Montana, 1921, as amended by laws of 1931, Chapt. 194:

"Any interested person, who has appeared, copartnership, association or corporation being dissatisfied with any finding, findings or decision of the *Commissioner* (Investment Commissioner) made in accordance with the provisions of *this Act*, may within thirty days from the making thereof, commence an action in any court of competent jurisdiction against said Commissioner as defendant, to vacate and set aside said finding, findings or decision, on the ground that the said findings or decision are unjust or unreasonable. The *rules of pleading and procedure* in such action shall be the same as provided by law for the trial of equitable actions in the district courts of this state and on the hearing the judge of said court may *set aside, modify or confirm* said findings or decision as the evidence and the rules or equity may require. Appeals may be taken from the decision of the district court to the Supreme Court by either party in the same manner as is provided by law in other civil actions. Pending any such action, the said findings or decision of said Commissioner shall be prima facie evidence that they are just and reasonable and that the facts found are true, and

pending any such action the said findings or decision of the Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding.

"Provided, however, that the original application with reference to which an appeal is herein provided for shall not be heard by the Investment Commissioner until notice of hearing on the same has been published at the capital city daily, in at least seven issues of such paper, and provided further, that upon such hearing on the original application, any person, co-partnership, association or corporation interested in or opposed to said application may appear." (Italics and matter in parenthesis ours).

(e) Sec. 9243, Revised Codes of Montana, 1921:

"Injunction Order—When Granted. An injunction order may be granted in the following cases:

1. When it shall appear by the complaint by the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff;

3. When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

4. When it appears by affidavit that the defendant, during the pendency of the action, threatens, or is about to remove or dispose of his property,

with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition."

(f) Section 266 of the Judicial Code, as amended:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the

complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

(g) Section 1 of the Fourteenth Amendment of the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This court has jurisdiction of the instant appeal by reason of the provisions of Section 266 of the Judicial Code ante, in that this is a direct appeal from an order of a statutory court denying, after notice and hearing, an interlocutory injunction involving the constitutionality of a rate order of the Public Service Commission of Montana. The amount directly in controversy is the difference between the existing rates and the reduced rates as ordered by the Public Service Commission, which, in this case, amounts to $11,326.00 per year, R. 49.

Statement of the Case

On September 13, 1935, the Public Service Commission of Montana entered its report and order No. 1666 fixing the value for rate making purposes of the appellants electric system in Baker, Montana district (R. 16-20) at approximately *one-half its assessed value* for taxing purposes (R. 48), and directing the appellant to file with the Commission on or before September 25, 1935, (retroactively effective as of September 1, 1935) a revised schedule of rates (R. 16-20) under which, the allowable operating expenses, taxes and de-

preciation expense would substantially *exceed the gross revenue* (R. 48) with *nothing for interest or return* on the investment.

On September 25, 1935, appellant filed in the Federal District Court for Montana its suit in equity seeking to restrain as unlawful and confiscatory the report and order of the Commission above referred to (R. 1).

The bill of complaint alleged: diversity of citizenship; the requisite amount in controversy; immediate, substantial, daily and continuing confiscation; that the laws of Montana (Sec. 3906, ante) prohibit the courts of that state from issuing an injunction pendente lite to restrain the enforcement of the said rate order; and that the complainant had no plain, speedy or efficient (adequate) remedy at law or in equity in the courts of the state, nor otherwise except by resort to the Federal District Court to protect it against such confiscation, (R. 1-16).

The defendants (appellees here) filed a motion to dismiss the suit upon the grounds:

(a) that the Federal District Court was without jurisdiction to entertain the suit or make any order therein, and,

(b) that the bill of complaint did not state facts sufficient to constitute a cause of action in that court (R. 36).

The appellees did not argue the second ground (sufficiency of the facts) and the lower court gave it no consideration in its opinion (R. 38).

The statutory court, consisting of Judge Haney of the Circuit Court of Appeals, and District Judges

Pray and Baldwin, granted the motion to dismiss (R. 38) and entered a decree dismissing the suit (R. 42), upon the ground that it was without jurisdiction by reason of (a) the Johnson Act ante, (b) the ruling of this court in *Porter v. Investors Syndicate,* 286 U.S. 461 (1932), and (c) the lower court's own prior decision in *Montana Power Company v. Public Service Commission of Montana, et al,* reported in 12 F. Supp. at p. 946.

Assignments of Error

The District Court erred and abused its discretion in the following respects:

1. In refusing to grant an interlocutory injunction where the admitted allegations of the bill of complaint and the undisputed affidavits filed therewith clearly disclosed substantial, daily and continuing confiscation of complainant's property and that the damage complainant will suffer, if the Commission order is permitted to become presently effective, will be irreparable.

2. In holding that the laws of the State of Montana afford appellant "a plain, speedy and efficient remedy at law or in equity," in the courts of the state, within the meaning of the Johnson Act, ante.

3. In holding that the Johnson Act divested the District Court of its jurisdiction in a confiscation case where the State statute denies stay or supersedeas pending final determination.

4. In holding Section 3906 Revised Codes of Montana, 1921, to be unconstitutional.

5. In holding the decision in *Porter v. Investor's*

Syndicate, ante, to be authority for or a "direction" to, so construe the said Section 3906.

6. In construing the decision in *Porter v. Investor's Syndicate,* ante, as giving appellant a clear right to stay pending final determination in the state courts of Montana.

7. In sustaining the motion to dismiss for alleged lack of jurisdiction.

8. In refusing to issue the interlocutory injunction as prayed for.

SUMMARY OF ARGUMENT

The position and contention of appellant was and is: (a) that the Johnson Act, ante, does not remove from the Federal District Courts jurisdiction in cases such as this but specifically retains such jurisdiction, where it appears the state law does not provide a plain, speedy and efficient or adequate remedy to protect against substantial, daily and continuing confiscation; (b) that the laws of Montana do not provide such a remedy,—but on the contrary such laws (Section 3906 ante) expressly denied appellant an injunction pendente lite; (c) *Porter v. Investors' Syndicate,* ante, used as the basis of decision by the lower court, is a *Prentis* case (211 U.S. 210). The rule in the *Prentis* case is not applicable because the courts of the state of Montana are not given authority to exercise a legislative function with respect to Public Service Commission rate orders,—they may only "vacate or set aside,"—they *cannot* revise or modify such orders; (d) *Porter v. Investors' Syndicate, ante,* is not applicable in the instant suit because it is based upon other and materially dissimilar state statutes, i. e.,

statutes giving the state courts legislative powers and functions with respect to orders of the officer there involved and making available stay or supersedeas under the general laws of the state; (e) neither of the powers referred to in (d) are present in the instant suit or appeal; (f) the rule announced in *Pacific Telephone & Telegraph Company v. Kuykendall,* 265 U. S. 196, is controlling of the issue here presented; (g) Appellant was under no obligation to have the constitutionality of Section 3906, ante determined, before seeking relief in a Federal court.

(A)

The Johnson Act, Does Not Divest This Court of Jurisdiction in The Instant Case

The Johnson Act specifically retains in the Federal District Courts, jurisdiction in suits such as the instant one where a plain, speedy and efficient remedy is not provided in the courts of the State. The language and unequivocal intent of Section 3906, Revised Codes of Montana, 1921, calls for no argument, construction or illustration to determine its plain meaning. It says clearly that the courts of the state are prohibited from issuing an injunction *pendente lite* with respect to rate reduction orders of the Public Service Commission of Montana.

While no direct challenge to the constitutionality of Section 3906, ante, has been presented to the Supreme Court of Montana, that court has on more than one occasion given consideration to, quoted, and applied the prohibition therein contained.

The section was quoted in *Billings Utility Co. v.*

Public Service Commission, 62 Mont. 1, 203 Pac. 366 (1921), and this comment made:

> "The rates fixed, as by the statute directed, are *prima facie* lawful, can be attacked in court on the sole ground that they are unlawful or unreasonable, shall be deemed reasonable and just *until final determination* by the courts and the burden of proof rests on the party antagonizing the order."

The section was again considered in *State ex rel. Public Service Commission v. Great Northern Utilities Co.,* 86 Mont. 442, 284 Pac. 772 (1929), and this comment made:

> "the statute *prohibits the court* in such an action *from issuing an injunction pendente lite* and declared that the 'rates fixed by the Commission shall be deemed reasonable and just, and shall *remain in full force and effect until final determination* by the courts having jurisdiction (Secs. 3905 and 3906, Rev. Codes 1921), and Sec. 3911 Id., specifically authorizes mandamus proceedings to compel obedience to the orders issued." (Italics ours.)

The Board of Railroad Commissioners of Montana is, ex officio, the Public Service Commission of Montana (Section 3880, Revised Codes of Montana, 1921). In the act creating the parent board there is found Section 3809 Revised Codes of Montana, 1921 (formerly Section 4390 Revised Codes, 1907) reading in part as follows:

> "That *until the final decision* in any such action the classification, rate, toll, charge, regulation or *order of the board* affecting rates or charges *shall be deemed to be final and conclusive*: And provided, further, that in any action, hearing or proceeding in any court, the classification, rate, tolls,

charges, regulations and orders made, fixed and established by said board shall prima facie be deemed to be just, reasonable and proper." (Italics ours.)

These provisions were directly examined by the Supreme Court of Montana in *State ex rel. Board of Railroad Commissioners v. District Court*, 53 Mont. 229, 233, 163 Pac. 115 (1917), and this conclusion expressed:

> "Provisos to the same effect are found in Section 4391. They are not expressed in the most apt and appropriate terms; yet it is *obvious*, we think, that it was the purpose of the legislature in enacting the first to *restrict the power of the court to disturb or suspend the operation of an order of the board promulgating a rate or charge until final judgment;* while by the second it was the purpose merely to declare the rule by which the evidence must be weighed with reference to this kind of order as well as any other which the board may promulgate. *The effect* of the first *is to take from the court all power of control over any order relating to rates and charges except by final judgment. This necessarily deprives a* railroad *company* as well as the shipper, *of the right* to invoke, and *prohibits the court from issuing a preliminary injunction in this behalf.*" (Italics ours.)

We do not believe it was the intention of either the framers of the Johnson Act nor of the Congress that that Act would deny to a citizen, his rights under the federal constitution nor his resort to this court in situations such as are presented by the instant suits wherein it is so apparent the state process is inadequate to afford relief.

Probably the best evidence of this is a statement of

the Honorable John E. Benton, of Washington, D. C., General Solicitor of the National Association of Railroad and Utility Commissioners, an organization which embraces within its membership the members of the State Public Service Commissions. As disclosed by the printed report of the hearings of the Judiciary Committee of the House of Representatives of the 73rd Congress, Second Session, Mr. Benton appeared on February 27, 28 and March 1, 1934, and supported this bill as the representative of the State Commissions. (U. S. Government Printing Office Document 45,740, at p. 216-217), Mr. Benton testified as follows:

> "In the brief filed on behalf of the Commonwealth Edison Co., the Peoples Gas Light Co. of Chicago, and various other utilities, the following assertion was made on page 6:
>
> " 'The fact is, as brought out later in this memorandum, that adequate relief against confiscation cannot under the statutes of many, and perhaps most, States, be obtained by a utility during the process of appeal from a commission order through the state courts.'
>
> "The later statement in the brief, referred to in the quotation just made, appears on page 8:
>
> " 'The State Courts cannot, except in a few instances where they are given legislative authority in rate cases, grant by injunction any affirmative relief to the utility from the confiscatory order of the commission.'
>
> "Similar statements have been made during the hearing by other utility counsel.
>
> * * * * * *
>
> "Perhaps the shortest answer to make to this astonishing assertion of utility counsel, however, is that *by the plain terms of this bill, it will not be*

applicable in any state *where the courts of the state do not exercise jurisdiction to restrain confiscation.* The bill is to apply only in states where a 'plain, speedy and efficient remedy' may be had in the state courts.

"The construction of this bill, if it becomes a law, and the determination whether the facts in any case, under the law as construed, are such that the act applies, *will be for the Federal District Courts,* with appeal to the United States Supreme Court. *The right to be protected against confiscation of property is a constitutional right.* The act recognizes that a utility suffering violation of any constitutional right is entitled to a speedy remedy, and reserves jurisdiction to the Federal courts to protect it, *if in any state,* the state courts are *disabled to protect it.* In whatever states, if any, the state courts in fact are without power to give a 'plain, speedy and efficient remedy,' *this act will not apply;* and *the jurisdiction of the United States district courts, as now existing, will continue to be exercised.*" (Italics ours.)

Sec. 3906, supra, is and was a part of Chapter 52 of the 1913 Session Laws of Montana. Chapter 52 enlarged the functions of the Railroad Commission of Montana and created the Public Service Commission, giving it jurisdiction with respect to the valuation and rates of electric and other utility companies, which it had not theretofore had or exercised.

Section 3880, Revised Codes of Montana, 1921, was Section 2 of said Chapter 52. Section 3880, in part, reads as follows:

"The Board of Railroad Commissioners of the state of Montana shall be ex-Officio the Public Service Commission hereby created, and for the purpose of this act shall be known and styled 'Pub-

> lic Service Commission of Montana.' * * * "and in the name as above set forth, it may sue and *be sued in the courts* of the state and *of the United States.* * * *"' (Sec. 2, Ch. 52, Laws '13.) (Italics ours.)

The quoted sections (3880 and 3906) being parts of the same act, and not having been amended or repealed, argue strongly the Montana legislative intent (in 1913 and today, 1936) that a public utility should, at its election, have the right to proceed in either the state or Federal court. Section 3880, supra, contains no provision that suits against the Commission in Federal court are limited to any particular class or character of suit or issue.

The Johnson Act, ante, was passed May 14, 1934. The regular session of the Montana legislature convened and adjourned during the early months of 1935, without amending or repealing either of these sections. (Montana Session Laws, 1935.)

These two state laws, one denying appellant an injunction *pendente lite* on appeal from an admittedly confiscatory rate order, and the other authorizing the Public Service Commission to be sued in Federal court, compels the conclusion the legislature of Montana intentionally sought to supply a deficiency in Montana law (as measured by the Federal requirement of a plain, speedy and efficient remedy in confiscation cases) by inviting resort to the Federal courts.

This court has not had occasion, since the passage of the Johnson Act, to pass upon situations such as are here presented. It did, however, consider the Johnson Act in *Corporation Commission of Oklahoma, et al. v. Carey, Trustee,* 296 U. S. 452. This case was re-

ported below in 9 F. Supp. at page 709.

Prior to the Johnson Act, the District Court of the United States, constituted as required by Section 266 of the Federal Judicial Code, as amended, had jurisdiction of any case involving the reasonableness or confiscatory character of rates prescribed by a state administrative board, provided the requisite jurisdictional amount was in controversy and provided further that the legislative process of prescribing rates had been completed. Such jurisdiction existed without reference to any remedy at law or in equity being available in the state courts to suspend the operation of such rates pending a judicial review.

Prendergast v. *New York Telephone Co.*, 262 U. S. 43,

Bacon v. *Rutland R. Co.*, 232 U. S. 134,

Love v. *Atchison T. & S. F. Ry. Co.*, 185 Fed. 321.

Neither the Johnson Act, nor any other act of Congress can, so long as we have provision in our constitution for the protection of property rights, take from a citizen his right to protection against the confiscation of his property.

The only present method of securing such protection is by resort to the courts. Since the laws of Montana deny such right he has recourse only to a federal court.

(B)

The Decision in Porter v. Investors Syndicate, 286 U. S. 461, Is Neither Applicable Nor Controlling Here.

Appellees, in argument and brief, have stated their

reliance upon the decision in the Porter case, ante, as decisive and controlling of the issue here presented. The Statutory Court adopted appellee's argument and based its decision squarely and solely upon an interpretation of the Johnson Act, ante, and the decision in the Porter case.

The Statutory Court said, (*Montana Power Company v. Public Service Commission of Montana, et al,* 12 F. Supp. at p. 951):

> "if the Supreme Court were to write a *decision for our guidance* in the interpretation of Section 3906, considered in connection with the Johnson Act, it could not do so more pointedly and effectually than it has done in the *Porter* case, and it cites the identical state statute to which recourse could be had by complainants for a stay of the commission's order, viz: Section 9243, which reads: 'Injunction Order—When Granted: An injunctive order may be granted in the following cases:
>
> " '1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such relief, or any part thereof necessary in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;'
>
> " '2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff.' "

We respectfully differ with the three-judge court in their interpretation of the *Porter* case, ante, and the application of the statutes of Montana referred to in that case.

The facts of the *Porter case* were these. The Investors' Syndicate was an investment concern licensed to

do business in Montana pursuant to a Blue Sky Law effective in 1930. The Syndicate had built up a considerable business under the authority of its license. The Montana state officer charged with the duty of granting and revoking such licenses promulgated a rule which would seriously interfere with the Syndicate's business and in that connection asserted his intention to revoke the Syndicate's license if it failed to obey the rule. The Syndicate thereupon filed its Bill in the Federal District Court seeking to enjoin the state officer from revoking the license for failure to comply with the order. A specially constituted court was convened under the provisions of Section 266, Judicial Code, and upon hearing before such court an injunction was granted. The case came to the Supreme Court of the United States by direct appeal. This court reversed the District Court upon the ground the Syndicate had failed to exhaust its administrative remedy under state law before applying to the Federal District Court for injunctive relief.

The *first* ground of the decision to be specially noted is that with respect to the sort of administrative order dealt with in the case. The portion of the decision pertinent to this matter reads as follows (286 U. S. at p. 468):

> "The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (supra) confers on any interested person dissatisfied with a finding or decision by the commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge '*may set aside, mod-*

ify or confirm said . . . decision as the evidence and the rules or (sic) equity may require.' The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely *judicial,* that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. The duty is laid on the court to examine the evidence presented and either to set aside or to *modify* or to affirm the commissioner's orders, as the proofs may require. *The legislative process remains incomplete until the action of that court shall have become final.* Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 229, 230, 53 L. Ed. 150, 160, 29 S. Ct. 67; Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 444, 450, 451, 60 L. Ed. 1084, 1095, 1097, 1098, 36 S. St. 637. And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. Keller v. Potomac Electric Power Co., 261 U. S. 428, 438-442, 67 L. Ed. 731, 734-736, 43 S. Ct. 445. When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year, an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety and legality of the order."

"The *present case* is not one in which the review of the commissioner's action is *judicial* in character. *If it were* the authorities cited by appellee which hold that one competent to invoke the jurisdiction of the federal courts *is not bound to pursue a judicial review* in the state courts would apply. See Bacon v. Rutland R. Co., 232 U. S. 134, 58 L. Ed. 538, 34 S. Ct. 283; Prendergast v. New York Teleph. Co., 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466; Railroad & Warehouse Commission v. Du-

luth Street R. Co., 273 U. S. 625, 71 L. Ed. 807, 47 S. Ct. 489. As we have seen, under the Montana statute the *administrative* proceeding is not complete until the court shall have acted in *revision and correction* of the commissioner's decision. It would be strange indeed if the commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative procedure existed. We cannot so read the act in the absence of clear and unambiguous phraseology requiring that course, or of a decision of the state court so construing it." (Italics ours.)

Under Montana law (Sec. 3906) the function of the state court with respect to orders of the Public Service Commission is solely judicial,—it prohibits the courts of that state from exercising legislative functions. The courts of the state under Section 3906, may only "vacate or set aside" Public Service Commission rate orders; they cannot modify them. We understand counsel for the appellees concedes the courts of Montana act only in a judicial capacity and in no sense do they exercise legislative functions with respect to such rate orders.

Therefore, the rule of the *Prentis case* (*Prentis v. Atlantic Coast Line,* 211 U. S. 210,) and similar cases does not apply with respect to litigation involving rate orders of the Public Service Commission of Montana.

The *Porter case,* was a *"Prentis case."* The instant suit is not a *"Prentis case."*

Apparently in the *Porter case,* it was not denied with respect to state court review of administrative action of the sort involved in *that case* the courts had some measure of legislative function. In this respect there

is a clear distinction between the *Porter case* and the case at bar, for it is definitely established the Montana courts exercise no legislative function in connection with their examination of orders of the Public Service Commission of Montana.

The *second point* to be specifically noted in the *Porter case,* is the ruling with respect to the availability of supersedeas under the Montana law there involved.

The court says that if a litigant will suffer irreparable harm by reason of an administrative order, in the absence of a stay, and *the state law does not afford such a stay, then there is a denial of due process,* and cites in support thereof, *Pacific Telephone and Telegraph Company v. Kuykendall, post.* We quote from the decision in the *Porter case* in that respect, as follows (286 U.S. at p. 470-471).

> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 454, 60 L. Ed. 1084, 1098, 36 S. Ct. 637. *But where either the plain provisions of the statute* (Pacific Telephone and Telegraph Co. v. Kuykendall, 265 U. S. 196, 203, 204, 68. L. Ed. 975, 980, 981, 44 S. Ct. 553) *or the decisions of the state court interpreting the act* (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353) *precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases*

where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified." (Italics ours.)

But, the court says in the *Porter case,* under Montana law *there is provision for supersedeas* under the general procedural statutes of Montana there involved.

The section of the Montana law involved in the *Porter case* and relating to appeals from the state officer who had revoked the Syndicate's license (Sec. 4038) provided that such appeals might be taken under the general laws of the state relating to appeals. By the express provisions of those general laws an injunction *pendente lite* could be had.

Section 4038 of the Montana Code provided in part:

"The rules of pleading and procedure in such action shall be the same as provided by law for the trial of equitable actions in the district courts of the state."

The general law, (Sec. 9243, ante) with respect to the trial of equitable actions provided for supersedeas.

Section 3906, here in question, is complete in itself, —both with respect to the judicial, as distinguished from legislative functions of the state court and with respect to supersedeas or stay. Neither Section 3906 nor any other section of the Public Service laws of Montana authorize or contemplate a resort to other or general laws for appellate or injunctive relief pending appeal. It is the sole authority of the Montana courts with respect to orders of the Public Service Commission.

It will thus be seen the *Porter case* is inapplicable to the situation here upon both grounds upon which it was decided, namely:

(a) in the *Porter case* the laws of Montana *authorized* the state courts to exercise legislative functions, whereas in the instant suits the state courts are *denied* the exercise of legislative functions;

(b) in the *Porter case* there was express *provision for supersedeas* or stay pending *final determination* in the courts of the state, whereas in the instant suit there is an express provision of the only applicable law (Sec. 3906) *denying supersedeas* or stay pending final determination.

(C)

Constitutionality of Section 3906, Montana Revised Codes—1921

The Statutory Court, in speaking of the decision in *Porter v. Investors' Syndicate,* ante, said (12 F. Supp. at p. 953), that that decision:

> "*is a plain direction to hold such a law* as we have been considering in Section 3906, denying a supersedeas or stay, *unconstitutional and void,* as violative of the provisions of the Constitution of the United States, for the reason, that it would permit the taking of the property of the complainant without due process of law, which is contrary to the Fourteenth Amendment."

We believe the Statutory Court was in error in its interpretation that the Porter case was a "direction" to that court to hold section 3906 unconstitutional. On the contrary, the court in the Porter case, in discussing the constitutionality of Section 4038 of the Montana Blue Sky Law said, (286 U. S. 470-471):

> "*But where either* the plain provisions of the statute (*Pacific Teleph. & Teleg. Co. v. Kuykendall,* 265 U. S. 196, 203, 204, 68 L. Ed. 975, 980,

981, 44 S. Ct. 553) *or the decisions of the State Court interpreting the act* (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 553) *precludes a supersedeas or stay* until the legislative process is completed by the final action of the reviewing court, due process is not afforded, *and in cases where the other requisites of Federal jurisdiction exist recourse to a Federal court of equity is justified.*" (Italics ours.)

Assuming for purposes of argument, that counsel for the Commission had some measure of authority to confess the invalidity of Section 3906, there would still remain a serious question as to what the Supreme Court of Montana would say in that respect. In other words, that court might well follow the rule announced by the Supreme Court of California to the effect that the legislature has power under the state constitution to deny injunctive relief.

Spreckles v. *Sugar Company*, 49 Pac. 353;
Wright v. *Superior Court*, 73 Pac. 145;
Barnett's Estate, 275 Pac. 453.

This court has indicated that such a determination is purely a question for the state courts.

Gasquet v. *Lapeyre*, 242 U. S. 367.

Justice Brandeis in his dissenting opinion in *Traux v. Corrigan*, 257 U. S. 354, 374 et seq, in discussing the right of a state to provide or deny injunctive relief, says:

"A state is free since the adoption of the Fourteenth Amendment, as it was before, not only to determine what system of law shall prevail in it, but also, by what process legal rights may be asserted, and in what courts they may be enforced. * * * As a state may adopt or reach trial by jury

* * * or, adopting it, may retain or discard its customary instances * * *. As a state may grant or withhold review of a decision by appeal * * * so it may determine for itself, from time to time, whether the protection which it affords to property rights through its courts shall be given by means of the preventive remedy or exclusively by an action at law for compensation.

"*Nor is a state obliged to protect all property rights by injunction* merely because it protects some, even if the attending circumstances are in some respects similar. The restraining power of equity might conceivably be applied to every intended violation of a legal right. On grounds of expediency its application is commonly denied in cases where there is a remedy at law which is deemed legally adequate. But an injunction has been denied on grounds of expediency in many cases where the remedy at law is confessedly inadequate. This, of course, whenever a dominant public interest is deemed to require that the preventive remedy, otherwise available for the protection of private rights, be refused, and the injured party left to such remedy as courts of law may afford.

Thus, courts ordinarily refuse, perhaps in the interest of free speech, to restrain action libels * * * in the interest of personal liberty that ordinarily refuses to enforce specifically, by mandatory injunction or otherwise, obligations involving personal service * * *. In the desire to preserve the separation of governmental powers they have declined to protect by injunction mere political rights * * * and have refused to interfere with the operations of the Police Department. * * * *Instances are numerous where protection of property by way of an injunction has been refused solely on the ground that serious public inconven-*

*ience would result from restraining the act complained of * * *.*" (Italics ours).

After mentioning other similar circumstances, Justice Brandeis continued:

"Such limitations upon the use of the injunction for the protection of private rights have ordinarily been imposed in the interest of the public by the court, acting in the exercise of its broad discretion. But in some instances the denial of the preventive remedy because of a public interest deemed paramount have been *expressly commanded by statute.* Thus, the courts of the United States have been prohibited from staying proceedings in any court of a state (Judicial Code, Sec. 265): and also from enjoining the illegal assessment and collection of taxes * * *.

"*What Congress can do in curtailing equity power of the federal courts, state legislatures may do in curtailing equity powers of the state courts,* unless prevented by the constitution of the state. In other words, states are free since the adoption of the fourteenth Amendment as they were before, either to expand or to contract their equity jurisdiction. The denial of the more adequate equitable remedy for private wrongs is, in essence an exercise of the police power, but which, in the interest of the public, and in order to preserve the liberty and the property of the great majority of the citizens of a state, rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society." (Italics ours).

(The use of asterisks in the foregoing quotations from Justice Brandeis' opinion indicate omission of the decisions and statutes there cited.)

The language quoted last above should be a complete answer to the contention which we understand will be

made on behalf of the Montana Public Service Commission in the case at bar, to wit: that if Montana law denies a stay it is to that extent invalid and that Montana courts have power to grant a stay.

In *Pacific Tel. & Tel. Co.* v *Kuykendall,* 265 U. S. 196, this Court said: (p. 205)

> "A litigant whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the State tribunals, may properly base his application for equitable relief on the *effect of the statute and the presumption of its validity,* and *is not required to establish* that the *State statute is not invalid under the State Constitution. Dawson v. Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, 296, 65 L. Ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case." (Italics ours).

In *Union Pac. R. Co.* v. *Weld County,* 247 U. S. 282, the Court said: (p. 287)

> "An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. *The question is purely one of State law,* and, so far as we are advised, the supreme court of the State has not passed on or considered it. *A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law.* On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, *the situation is not one in which cognizance of the present suit properly can be declined.*" (Italics ours.)

It was not incumbent upon appellants to bring a

suit in the state courts, testing the validity of Section 3906, ante, as a prerequisite to a resort to the federal court for protection.

It cannot be charged that appellant in this case purposely sought to avoid jurisdiction of the state's courts, by resort to the Federal courts for any reason of policy, when there is taken into account the abortive valuation and rate order involved, and briefed and discussed at some length in the application before this court for a stay. If there ever was a case, which upon its merits would appeal to the equity of any court, the merits of this case bring it within that category.

In other words, appellant resorted to the Federal court because it was the only place where it had any assurance of receiving that plain, speedy and adequate remedy which the constitution of the United States contemplates and guarantees.

See Corporation Commission of Oklahoma v. *Carey,* 296 U. S. 452.

(D)

The Decision in Pacific Telephone and Telegraph Company v. Kuykendall, 265 U. S. 196, and Corporation Commission of Oklahoma v. Carey, 296 U. S. 452, State the Rule Applicable Here.

We respectfully request the indulgence of the court in a review of the facts and law involved in the *Pacific* case.

The facts of the *Pacific case,* ante were these. The Pacific Company filed its Bill in the Federal District Court to enjoin the Department of Public Works of Washington from interfering with the collection of

increased telephone rates filed with the Department, and the application of which was denied after hearing and order. The three judge court set aside the temporary restraining order issued by the District Judge on the filing of the Bill, and denied the application for temporary injunction. Upon a direct appeal, this court reversed the three judge court. After an appeal had been taken as stated from the dispostion of the matter by the three judge court, a single District Judge heard the case on a motion to dismiss the Bill, and granted the motion, and from this dismissal a second appeal was taken, and consolidated with the first appeal.

In examining the decision in the *Pacific case* supra, it must be borne in mind the court is dealing with two sorts of review procedure under the Washington Public Service Commission law. Sections 10428 and 10424 (Rem. Rev. Stat.) were treated as dealing with the special procedure for review of rate orders. Examining Sections 10428 the court said (265 U. S. at p. 200):

> "By the statutes of Washington (Rem. Com. Stat. 1922 Sec. 10428), any complainant affected by any order of the commission (now the Department), may, within thirty days, apply to the superior court of the proper county for a writ of review 'for the purpose of having its reasonableness and lawfulness inquired into and determined.' The Commission certifies the record upon which the court is to enter judgment affirming or setting aside the commission's order. If reversed for failing to receive proper evidence offered, the case is to be referred back to the commission to receive the evidence and enter a new order. The court may remand any case reversed by it to the commission for further action. *It is clear that the function to*

be performed by the superior court under this section is judicial. It does not fix *rates* or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks into the reasonableness and lawfulness of the order of the commission, and is to determine whether evidence which should have been received was rejected, and, in that case, is to send the case back to the commission for a new order. *The court does not act legislatively.*" (Italics ours.)

Examining Section 10424 the court found that this provision denied a stay in a *rate* proceeding, and in discussing the effect of Sections 10428 and 10424 said (p. 201):

"*It is apparent from these provisions that after the commission finally denied the increase of rates applied for, the company had exhausted its administrative remedy to avoid the alleged confiscatory rates under which it was compelled to render the service.* It had, therefore, no recourse but to a court. Both by reason of diverse citizenship and because of the Federal constitutional question, the Federal court of equity was available to it. The *state statute forbidding a stay* of proceedings until a final judicial decree was rendered, of course, *could not prevent a Federal court of equity from affording such temporary relief by injunction as the principles of equity procedure required.* The conditions set out in bill, therefore, seem to have made a case ripe for Federal relief. Bacon v. Rutland R. Co., 232 U. S. 134, 58 L. ed. 538, 34 Sup. Ct. Rep. 283; Prendergast v. New York Teleph. Co., 262 U. S. 43, 48, 67 L. ed. 853, 857, 43 Sup. Ct. Rep. 466." (Italics ours.)

The court next examined Section 10441 (Rem. Rev. Stat.), which was at that time the provision for *val-*

uation procedure and review, and with respect thereto held as follows (p. 202):

> "It is clear that the function of the courts in fixing the *valuation* of the property of the public utility is not confined to a judicial review of the work of the commission. The courts are made part of the valuation tribunal, pass on the weight of the evidence, and can set aside a valuation and make a new one. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. Rep. 445.
>
> "It is thus apparent that the contention of the Department and the state authorities that the company has not exhausted its remedy to secure a change in the valuation of the property by the superior and supreme courts of the state is correct, and that resort to them to change the *valuation* would be no bar to a resort to a Federal court of equity to enjoin the enforcement of rates based upon such valuation after it had been approved by the state courts. It was on this ground that the district court held, both on the application for a temporary injunction before the three judges and upon the final dismissal, that the bill was premature, and could not be brought until after the final confirmation of the valuation by the state supreme court."

Under a state law terminating the legislative process with respect to *rate* proceedings with the determination of the regulatory body, but continuing the legislative process in the state court with respect to *valuation* proceedings, this court found no difficulty in holding that a bill in the Federal court was not premature by reason of failure to exhaust state remedies.

With respect to the legislative function of the courts of the state of Washington under the preview of Section 10441 (*valuation*), it was argued by the Pacific

Company that the constitution of the state of Washington does not authorize the state legislature to vest the state courts with legislative power to fix *rates,* and that therefore after the Commission had fixed the valuation, further court procedure in fixing valuation would be void.

This Court declined to pass upon this contention, saying in effect, that it could put its decision upon other grounds. *The Attorney General appearing for the Department contended (according to the decision) that the courts of Washington have inherent power to grant supersedeas, and that Sections* 10429 *and* 10424 *construed to prohibit supersedeas would be invalid.* The court likewise declined to enter into this controversy and said (p. 205):

> "A litigant whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the state tribunals, may properly base his application for equitable relief on the *effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state Constitution.* Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 296, 65 L. ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case."

In the following additional cases, namely, *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, and *Love* v. *Oklahoma Operating Co.,* 252 U. S. 331, it is evident the state statute providing for a review of commission orders was there conceded to be unconstitutional, or it was so intimated or so treated, but, notwithstanding such fact, this Court upheld the right of the complainant to proceed directly in the lower federal

court. Complainant was not subjected to the burden of inventing a remedy nor to the burden of delay while his opponent worked out a dilatory review. The opinion of the Court in each of these cases shows that the question was present in the minds of the court without being resolved along the line contended for by counsel for the Commission.

That these matters with respect to the validity of Washington law in vesting the courts of that state with legislative functions with respect to *valuation* orders, and that the courts of Washington have inherent power to grant supersedeas notwithstanding Sections 10429 and 10424, were actually in the case and considered by the court (although the court refused to regard them as determinative) is shown by the following quotations from the brief of the attorney general. In that brief the attorney general makes the following contention at page 15:

> "Washington state courts have legislative authority in reviewing the order of the Department of Public Works here complained of."

In this portion of the brief he considered Section 10424 (rates) and Section 10441 (valuation) together and reached the conclusion that the Washington courts did have legislative power in a situation such as that presented in the *Pacific case*. He further contended, at page 22, that:

"Section 10441 Rem. Comp. Stat. is constitutional," basing his argument upon the citation of Washington cases he further contended, at page 27 of his brief, that:

"If Section 10441 Rem. Comp. Stat. is unconstitu-

tional, it should be first so declared by the supreme court of the state of Washington."

On page 34 of his brief he commences an argument on the following point:

> "The supreme court of the state of Washington has inherent power to suspend an order of a lower tribunal by virtue of Article IV, Section four of the constitution of the state of Washington."

As previously indicated the court in effect declined to consider the contention of either party on these questions of state law and based its decision squarely upon the following, (p. 204):

> "In the case before us, the company is shown by the averments of its bill to be *suffering daily from confiscation under the rates to which it is now limited. It has done all it could to get relief, and cannot get it.* The rates here in question were in force for more than a year, the company advanced them, the old rates were reinstated by the Department of Public Works. In such a case, then, there was no chance for a stay. By Sec. 10429, (Rem. Comp. Stat. 1922) the pendency of any writ of review does not of itself, stay or suspend the operation of the order of the commission, but the superior court may suspend the order; but no order suspending an order of the commission relating to rates, etc., can be made unless the court finds that great or irreparable damage would be done to the petitioner, and the section contains the following proviso:
>
> "'Provided, however, that when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, *no supersedeas shall be allowed in any case from such*

order pending the final determination of the cause in the superior court, or, if appealed to the supreme court, by such supreme court.'

"Under such circumstances comity yields to constitutional right, *and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a Federal court of equity from suspending the daily confiscation, if it finds the case to justify it.* Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 293, 67 L. ed. 659, 662, 43 Sup. Ct. Rep. 353.

"In such a case the Prentis case has no application. Love v. Atchison, T & S. F. R. Co., 107 C. C. A. 403, 185 Fed. 321, 324, 325." (Italics ours.)

From the foregoing analysis it seems apparent the *Pacific case* was a much more difficult case from the standpoint of exhaustion of state remedies than the case at bar, and that the *Pacific case* must determine the case at bar irrespective of the *Porter case.* It is also apparent a major consideration in the application of the *Pacific case* is the factor of daily confiscation.

The record here clearly establishes such daily confiscation by reason of the application of the reduced rates ordered by the Montana Public Service Commission.

As the record here shows the Company applied to the Commission for a rehearing (R. 20) and a stay of the reduced rates, but in each instance its applications were promptly denied. (R. 22). Since the courts of the state cannot make new rates nor grant a stay, the appellant upon the filing of its suit in the federal court, had exhausted its remedy under state law, and stood subject to the imposition of severe penalties and the confiscation of its property.

The penalty for non-compliance with the Commission's orders is from one hundred to five hundred dollars per day,—each day's continued violation being a separate offense, (Sections 3888 and 3908 Revised Codes of Montana, 1921). The Attorney General of Montana is required by law to enforce the Public Service Commission rules and orders. (Section 3904, 3905 and 3910, Revised Codes of Montana, 1921).

The court in the *Porter case, supra,* in discussing its decision in the *Pacific case,* states the rule to be:

> "Where the plain provisions of the statute, precludes supersedeas * * * due process is not afforded and resort may be had to a federal court of equity."

In the opinion in the *Pacific case,* the case of *Dawson* v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, 296, is cited in support of the statement that the statute of Washington prohibiting a supersedeas pending the final determination of the case is presumed to be valid by the Federal Court. That was an equity case for an injunction to prevent the collection of taxes and the contention was made that there was a want of jurisdiction because of an adequate remedy at law by payment of the taxes and an action to recover. The court found that, in view of the statute and the decisions of the Supreme Court of Kentucky, there was a doubt whether the taxes, if paid, could have been recovered, and because of this doubt, the jurisdiction was sustained, the court said:

> "It is well settled that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit.'"

Union Pacific R. Co. v. *Weld County,* 247 *U. S.* 282; *Atlantic Coast Line R. Co.* v. *Daughton,* 262 *U. S.* 413.

In the recent case of *Carey* v. *Corporation Commission of Oklahoma,* 9 F. Supp. 709, a three-judge court, in a gas rate case, entertained jurisdiction because the court was in doubt whether, under the Constitution and statutes of Oklahoma, provision had been made for a judicial review of such an order. The court, in the opinion, said:

> "The Johnson Act (Jud. Code, paragraph 24, (1) 28 USCA Section 41 (1) deprives the United States courts of jurisdiction of controversies of this type only 'where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.' This court is unanimous in its opinion that whatever may be the eventual decision of the question so vigorously argued, it cannot now be said that there is a 'plain' remedy in the courts of the state.
>
> "We conclude, therefore, that *until the supreme court of Oklahoma determines* that the laws of the state afford a judicial review in some state court of an order of the Corporation Commission affecting rates chargeable by a public utility, *this court is not deprived of jurisdiction by the Johnson Act.*" (Italics ours.)

The decision of the Statutory Court in that case was affirmed in 296 U. S. 452.

Irrespective of the fact the Johnson Act was passed at a later date than the decision in *Pacific case, supra,* it specifically retains, rather than excludes, jurisdiction in the federal courts, of suits such as this.

The rule of the *Pacific case* has not been modified by subsequent decisions of this Court. The

Porter case, reiterates the rule with approval. It was not modified by the Johnson Act. In fact, the Johnson Act, by the last exception therein, with respect to "plain, speedy and efficient remedies," carefully preserves the rule. Otherwise, the constitutionality of the Johnson Act would be in serious doubt.

Conclusion

These conclusions seem inescapable:

(a) The Montana statute denies appellant a "plain, speedy and efficient remedy" in the courts of that state;

(b) The Johnson Act does not divest the Federal Courts of jurisdiction in a confiscation case such as this, and in the presence of such a state law;

(c) The *Porter* case is not applicable;

(d) This is not a *Prentis* case;

(e) The rule announced in the *Pacific* and *Carey* cases is controlling;

(f) The decision of the Statutory Court should be reversed and that court directed to maintain in effect the existing impoundment of revenues and the bond, pending the hearing and determination of the application for interlocutory and permanent injunctions.

Respectfully Submitted,

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Dated August 27, 1936.

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IN THE

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October Term, 1936

No. 38

MOUNTAIN STATES POWER COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, et al,
Appellees.

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Statement of the Case

The appellees assert that the allegations of appellant's complaint in the court below have not yet been established and will be controverted by answer.

The question of jurisdiction, here involved, was submitted to the lower court, upon appellees' motion to dismiss (R. 39), which is the equivalent of a demurrer. No answer has yet been filed.

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiff's legal rights under the 14th Amendment, we are at as full liberty to consider them as was the State Supreme Court." (Citing cases).
>
> *Truax* v. *Corrigan,* 257 U. S. 312, 324.

Reply to Appellees' Proposition Concerning Constitutionality of Section 3906, Revised Codes of Montana, 1921, Denying Injunction Pendente Lite.

The sole proposition in justification of the lower court's denial of jurisdiction, presented by appellees in their brief, is that Section 3906 R.C.M., 1921, in so far as it denies an injunction pendente lite, is unconstitutional and void, that so being, the statute should be read as though that provision were not in it, and that the appellant company should have proceeded in the State courts irrespective of that direct statutory prohibition.

Appellees admit that as the statute now stands it does deny injunctive relief against the confiscatory rate order pending final determination by the State courts.

When occasion arose to bring this suit the provision referred to stood upon the statutes of Montana as a valid law, construed by the courts of that State to mean just what it says in plain English, namely:

> "You can have no protection against the confiscation of your property while you are awaiting a determination of the merits of your case by the courts of this State."

A decision by this court as to the jurisdiction of the State courts under the constitution and laws of Montana is not binding upon the courts of that State; that is a question of state law which the courts of Montana may determine for themselves. In other words, this court can give appellant no assurance that the courts of Montana will afford a plain, speedy and efficient remedy to protect it against the admitted substantial, daily and continuing confiscation of its property.

In *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369:

> "And, as our decisions show, there is nothing in the clauses of the 14th Amendment guaranteeing due

> process and equal protection which converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the state into anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court." (Citing cases.)

In *McDonald* v. *Oregon R. and Nav. Co.*, 233 U. S. 665, 669, the court said:

> "It is elementary and needs no citation of authority to show that the due process clause of the 14th Amendment does not control methods of state procedure * * *."

As an evidence that the Supreme Court of Montana may entertain a different view as to the constitutionality of Section 3906, supra, we again direct attention to three decisions of that court wherein it considered, quoted, construed and applied the statute as denying an injunction pendente lite upon appeals under the Public Service Commission law of the State. The decisions referred to are, *Billings Utility Company* v. *Public Service Commission*, 62 Montana 21, *State ex rel Public Service Commission* v. *Great Northern Utilities Company*, 86 Montana 442; and *State ex rel Board of Railroad Commissioners* v. *District Court*, 53 Montana, 229. These decisions are cited and quoted at pages 13-15 of appellant's opening brief. In none of these cases was the direct question of the constitutionality of the statute involved but they indicate a meaning of the statute as contended by appellant and as admitted by appellee.

Section 2 of Article VIII of the Constitution of Montana gives to the Supreme Court of Montana "appellate jurisdiction only." Section 3 of Article VIII of that constitution authorizes the court to issue injunctions "as may be necessary or proper to the complete exercise of its appellate jurisdiction." Section 3 of Article VIII further provides

that the jurisdiction of the State Supreme Court extends to "all cases at law and in equity, *subject,* however, to such *limitations and regulations as may be prescribed by law.*"

The Supreme Court of Nevada, in *Steamboat Canal Co.* v. *Garson, et al.,* 43 Nev. 298, was considering a provision of the Public Service Commission Law of Nevada, which was *identical* with the provision of Montana Law here in question. The Montana statute (Sec. 3906) and the Nevada statute (Sec. 26, Ch. 162, Laws of 1911) read as follows:

> "(a) No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon: Provided, that *all rates fixed by the commission* shall be deemed reasonable and just, and *shall remain in full force and effect until final determination* by the courts having jurisdiction."

In fact the entire section of the Nevada statute providing for appeals from Public Service Commission orders, was practically word for word with Section 3906 of Montana Revised Code, 1921. The procedure for reviewing Public Service Commission orders was identical in the two states.

The Supreme Court of Nevada, in the last above mentioned decision, *passed directly upon the constitutionality* of the above quoted proviso and said:

> "* * * We also conclude that the court was likewise wrong in vacating the order of the commission establishing the rate of $7.50 per miner's inch and restraining its collection by the Steamboat Canal Co. As already pointed out, Section 26 provides:
>
> > 'That all rates fixed by the Commission shall be deemed reasonable and just, and shall *remain in full force and effect until final determination* by the courts having jurisdiction.'

"The lower court disregarded this provision of the statute in vacating the order of the commission and in granting an injunction pendente lite. No reason for this action appears from the record, but as the statute is mandatory, and as counsel for respondents insists in this court that *it is unconstitutional,* we assume that the lower court entertained the same view.

"(10, 11) It is contended that the proviso is violative of Section 8 of article 1 of the Constitution guaranteeing that 'no person shall be * * * deprived of * * * property, without *due process of law,*' * * *"

"* * * The purpose of the proviso is, we think, reasonably apparent to maintain the rate during the pendency of the trial and until final judgment in the district court. And *this provision does not,* in our opinion, *trench upon the constitutional guaranty of due process of law.* The provision objected to must be taken in connection with the entire act of which it is a part when considered as to its encroachment upon the constitutional guaranty of due process of law. The ultimate purpose of the act is to regulate and control certain classes of business impressed with a public interest."

"* * * it was competent for the Legislature to prescribe that the rates fixed by the commission should abide during the temporary season of a trial to test their reasonableness. * * *"

"We think that none of the essentials necessary to insure to the parties a full guaranty of *due process of law* are absent from the statute, nor *impaired by the provision under consideration.*"

"(15, 16) But still statutes identical with the provisions making the findings of the commission prima facie evidence of reasonableness of rates have been uniformly upheld by the courts against constitutional objections, upon the theory that no person has a vested right in any rule of evidence. * * * The proviso does not withhold a remedy for the imposition of unreasonable rates. The remedy is merely deferred for a period of time which, considering the policy of the law towards the establishment of rates by the commission cannot be said to be unreasonable, especially

in view of the fact that the statute accelerates the trial of this class of cases by giving them precedence over all civil causes of a different nature."

Section 4 of Article VI of the Constitution of Nevada contains no limitation, such as is found in Sec. 3 of Article VIII of the Montana Constitution. Both the Constitutions of Nevada and Montana contain a "due process" clause. Sec. 8, Art. I, Const. of Nevada, Sec. 27, Art. III, Const. of Montana.

The appellant was bound to assume the constitutionality of Section 3906, supra, at the time it instituted its suit in the Federal court, and was not required to hazard the continued confiscation of its property by bringing a suit in the State court, to test the constitutionaliy of that State statute.

The effect of the appellee's proposition is that Section 3906, supra, might be declared unconstitutional by the Supreme Court of Montana or that the courts of the State might grant a supersedeas notwithstanding the prohibition contained in the statute. We do not believe the court will indulge in any such speculation.

A statute is presumed to be constitutional and valid until it is declared unconstitutional by a court of competent jurisdiction. The constitutionality of Section 3906, supra, has not been passed upon by the Supreme Court of the State of Montana, although the constitutionality of an identical statute has been sustained by the Supreme Court of Nevada. (*Steamboat Canal Co.* v. *Garson,* 43 Nev. 298.)

Under the decision of this court (*Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196) appellant was not required to test the constitutionality of this state statute before acting upon it, but was justified in taking it at its face and proceeding accordingly. The Montana statute in plain terms denies supersedeas and when read in connection

with the Johnson Act is a direction to proceed in the Federal Court. The appellant pursued the only plain, speedy and efficient remedy available to it.

Reply to appellees' proposition that if Section 3906 R.C.M. 1921, is unconstitutional, appellant has a remedy under the general laws of the State relating to injunction.

Our answer to this proposition is, first, that Section 3906, supra, stood as a valid statute at the time this suit was instituted in the Federal Court, and had not been declared unconstitutional by the Supreme Court of Montana,—in fact an identical statute had been held constitutional, as affording due process, by the Supreme Court of Nevada. *Steamboat Canal Co.* v. *Garson.* Second, the remedy for reviewing orders of the Public Service Commission of Montana as provided by Section 3906, supra, was an exclusive remedy.

It is a well established rule of law of procedure and remedies, that where specific procedure is provided the litigant must avail himself of that procedure.

In *Barnet* v. *Muncie National Bank,* 98 U. S. 555, it was held that where a statute creates a right and provides a specific remedy, that alone applies. Appellant, therefore, was fully justified in looking solely to the specific procedure provided by Section 3906, supra, when it was called upon to consider what remedy it had and to what forum it could resort for relief from the confiscatory order of the Commission.

United States v. *Babcock,* 250 U. S. 328.
Bancroft Code Practice and Remedies, (1927) Vol. I, Sec. 135.

Conclusion.

It would be difficult to more concisely state the rule applicable in this appeal, than primarily in the words of Mr. Justice Roberts, in *Porter* v. *Investors Syndicate,* 286 U. S. 461, 471, and Mr. Chief Justice Taft in *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 205, namely,

(a) The "plain provisions" of Sec. 3906, R.C.Mont. 1921, and

(b) The "decisions of the state court interpreting the act," *Billings Utility Co.* v. *Public Service Commission,* 62 Mont. 21, *State ex rel Board of Railroad Commissioners* v. *District Court,* 53 Mont. 229, *State ex rel Public Service Commission* v. *Great Northern Utilities Co.,* 86 Mont. 442, and *Steamboat Canal Co.* v. *Garson,* 43 Nev. 298,

(c) Clearly "precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court." *Porter* v. *Investors Syndicate, supra.*

(d) A ruling by this court as to the constitutionality of Sec. 3906, supra, would not be binding upon the state court in its determination of its own jurisdiction under the Constitution and laws of Montana. *Gasquet* v. *Lepeyre,* 242 U. S. 367.

(e) Therefore, there is no "plain, speedy or efficient remedy" in the state courts.

(f) The appellant may of right "base his application for equitable relief (in the federal court) on the *effect* of the statute and the *presumption of its validity* and is not required to establish that the state statute" (is or) "is not invalid under the State Constitution," *Pac. Tel & Tel. Co.* v. *Kuykendall,* 265 U. S. 196.

(g) And "where the other requisites of federal jurisdiction exist" (amount in controversy, confiscation, etc.) "recourse to a federal court of equity is justified," *Porter* v. *Investors Syndicate, supra.*

(h) And this, irrespective of the Johnson Act, which specifically *retains* jurisdiction in the federal courts in

such cases, "where a plain, speedy, and efficient remedy may (not) be had at law or in equity in the courts of such state." Johnson Act, U.S.C.A., Title 28, Sec. 41 (1).

All matters in parentheses and italics ours.

We respectfully submit the lower court was in error in denying jurisdiction and dismissing the suit and its decree should be reversed with directions to maintain in effect the existing bond and impoundment pending the hearing and determination of the applications for interlocutory and permanent injunctions.

Respectfully submitted,

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Appellant,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, et al.,
Appellees.

APPELLEES' BRIEF

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APPELLEES' BRIEF

Statement of the Case

The statement of the case as made by appellant is only partially correct.

It starts out with statements purporting to describe the order of the Commission. But it should be noted that this description is but a repetition of the allegations of appellants' complaint filed in the Court below.

Those allegations have not yet been established, and at the proper time and place they will be controverted by answer.

The right to do so was expressly reserved at the hearing in the Court below. (R. 39-40).

We do not now and did not in the Court below concede that those allegations can be sustained. We are prepared to defend the order in question at the proper time and place.

The only question presented to the Court below and the only question here involved is one of jurisdiction. In what Court must appellants go to attempt to establish the extravagant allegations made in the complaint? That is the sole question here involved.

ARGUMENT

It is our contention sustained by the court below (12 Fed. Supp. 946) that the Federal Court was and is without jurisdiction by reason of the Act of Congress of May 14, 1934, reading:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political sub-division thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates, chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state."
>
> U.S.C.A. Title 28, Sec. 41 (1).

I.

(A) Remedy in the State Courts

The Montana Statutes provide for a judicial review of rate orders made by the Montana Public Service Commission.

Section 3906 R. C. 1921 in part provides:

> "Any party in interest being dissatisfied with an order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants, to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice, or service, fixed in such order, is unlawful or unreasonable."

That section further provides:

> "No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having first been given and hearing having been had thereon; provided, that all rates fixed by the commission shall be deemed reasonable and just, and shall remain in full force and effect until final determination by the courts having jurisdiction."

It is the last quoted proviso of this statute upon which appellant stands. In effect appellant contends that the remedy provided for by Section 3906 is not efficient since under the terms of the statute the order cannot be enjoined pendente lite.

(B) Sec. 3906 Unconstitutional in Part

Our position is that the State Statute which attempts to deny a stay pendente lite is unconstitutional and has been so held in Porter vs. Investors' Syndicate, 286 U. S. 461, 76 L. Ed. 1226. That case involved a Montana Statute (Sec. 4038 R. C. 1921) reading:

> "The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state . . . (and) pending any such action the said findings or decision of said Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding."

The Court speaking of that section said:

> "We are cited to no case, nor have we found any, in which the state courts have interpreted or applied the section. The first clause would obviously permit the issuance of an interlocutory injunction upon a proper showing, especially in view of the provisions of the Code of Civil Procedure. But it is said that the succeeding clause precludes such a remedy. The argument is that the words 'pending any such action' mean that during the continuance of the action and until its final decision the commissioner's order must remain in full force and effect. We think, however, that in this phrase the word 'pending' has the significance of 'until', or while the time is running for bringing such an action. This is one of the recognized meanings of the word, and that it is so used we think is made clear from the sentence immediately following, to the effect that if no action shall be brought to set aside the finding or decision within thirty days it shall become final and binding. When considered together we are of opinion that the two phrases mean

that unless and until a person affected brings his action he may not disregard the order."

The court then went on to say that unless the Statute were so construed as to give the right to a stay during the continuance of the action it would be unconstitutional. It said:

"We are persuaded to this view for the reason that it supports the constitutionality of the act, and we are bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality. Bratton v. Chandler, 260 U. S. 110. The construction thus adopted is consistent with the validity of the act, whereas that pressed upon us by the appellee would clearly render it unconstitutional."

Counsel for appellant contend that this decision is not applicable and controlling.

Their first contention on this point is that the Porter case is different from this because under the statutes involved in that case the state court in reviewing an order of the commissioner exercises legislative functions whereas reviews of rate orders under state statutes in Montana are judicial in character.

We think this is a distinction without a difference. The reason why the court declared such a statute unconstitutional was because of the harm that might result to interested parties if the order is effective pendente lite.

This is pointed out in the opinion of the court wherein it is stated:

"It would be strange, indeed, if the Commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative procedure existed."

Where the review is judicial the Court must either affirm or revoke the order under review. Where it is legislative the Court may modify the order.

Obviously, a harmful order passing under judicial review does more harm if effective pendente lite than one passing under legislative review for as to the former the entire order must fall whereas under the latter it may only be modified to eliminate that part which is harmful.

In other words let us suppose that on a rate investigation the facts would warrant a 20% reduction in the rates but the State Commission sees fit to reduce them by 25%. On a judicial review the entire order falls. On a legislative review the order will be modified by making only the 20% reduction.

If the order in each case is effective pendente lite the harm to the utility on a judicial review would be five times greater than on the legislative review. We contend, therefore, that there is more reason for condemning a statute denying a stay in a case where an order is judicially reviewed than in a case where the review is legislative. We believe the Porter case is decisive of this, and that it squarely condemns a statute denying a stay pendente lite in a case such as this.

If such a statute is not unconstitutional then appellant has a plain, speedy and efficient remedy in the state court, notwithstanding the statute.

Before appellant is in a situation to contend that the State Statute does not provide an efficient remedy it must show that under the State Statute a constitutional right is denied. If not the remedy is efficient. If the Statute denies a constitutional right, it is invalid to that extent.

Or, in other words, the only reason why the remedy in the State Court is not efficient is because the State Statute

denies a stay pendente lite. That is a denial of due process and hence the remedy is not efficient. Porter vs. Investors' Syndicate (supra). If it is a denial of due process, it is unconstitutional. If it does not deny due process then the remedy is efficient and the Johnson Act would apply.

Counsel next contend that the Porter case is inapplicable because we have no statute expressly authorizing injunctive relief.

(C) Other Valid Statutes in Montana Authorize Stay Pendente Lite

Our position is that since that part of Sec. 3906 which denies a stay pendente lite is unconstitutional, it is as if it were not in the Statutes.

In Hamilton vs. Board of Co. Com'rs., 54 Mont. 301, 169 Pac. 729, the Supreme Court of Montana said:

> "An unconstitutional statute is void, and a void thing is as nothing. A void statute is not a law. It imposes no duty, confers no authority, affords no protection, and no one is bound to observe it. In contemplation of law it is as inoperative as though it had never been passed."

To the same effect are the decisions of this court. Little R. & Ft. S. Ry. vs. Worthen, 120 U. S. 97, 30 L. Ed. 588; Norton v. Shelby Co., 118 U. S. 425, 30 L. Ed. 178.

Eliminating the provisions denying a stay, there would still be left in Section 3906 the following:

> "No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon."

It may be that where confiscation is alleged to be taking place during the period required for giving notice that the requirement of a notice and hearing is also unconstitutional. But whether so or not this language clearly contemplates the right of the Court to grant a stay. If all other restrictions in the statute must fall for want of due process, there is still left in Section 3906 the clear legislative purpose to vest the State Court with power to grant an injunction staying the operation of rate orders. We have in addition Sections 9243 et. seq. R. C. M. 1921 referred to and relied upon in the Porter case that have equal application here.

(D) Consideration of Appellants' Contentions

Under Sub-division (c) commencing on page 26 of Appellants' Brief appears this quotation from the Porter case:

> "But where either the plain provisions of the statute (Pacific Teleph. & Teleg. Co. v. Kuykendall, 265 U. S. 196, 203, 204, 68 L. Ed. 975, 980, 981, 44 S. Ct. 553) or the decisions of the State Court interpreting the act (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 553) precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of Federal jurisdiction exist recourse to a Federal court of equity is justified."

We agree entirely with that statement. That case was decided in 1932 and at that time recourse to the Federal Court was permissible. Federal and state courts at that time had concurrent jurisdiction, when there was diversity of citizenship or a Federal question was involved.

The Johnson Act changed that rule as of May 14, 1934.

Counsel on page 27 of their brief suggest that there may be some question as to what the Supreme Court of Montana might say on the question of the validity of Section 3906.

A good way to find out is to present the question to that Court. State District Courts treat Section 3906 insofar as it denies a stay as unconstitutional and grant restraining orders pendente lite and do so ex parte and without notice or hearing even when confiscation is not alleged during the period necessary to give notice.

This was done in a case arising in Park County, Montana. In no case has a stay pendente lite been sought and denied in the State Court.

It is suggested on page 27 of appellants' brief that the Supreme Court of Montana might hold that the legislature has power under the State Constitution to deny injunctive relief. California cases are then cited as well as two cases decided by this Court. We fail to see the applicability of these cases to the question under consideration here.

If counsel would contend that it is competent for the State Legislature to deny injunctive relief in rate cases then they are driven to the conclusion that they have an efficient remedy notwithstanding the denial of injunctive relief by the State Statutes.

That it is competent for the State Legislature to deny injunctive relief pendente lite has been exploded by the case of Pacific Tel. & Tel. Co. vs. Kuykendall, 265 U. S. 196, which we shall now consider.

(E) Consideration of Kuykendall Case

It should be remembered that the Kuykendall case was decided ten years before the Johnson Act was passed.

At the time of that decision as well as that in the Porter case there was concurrent jurisdiction in State and Federal Courts when there was diversity of citizenship or a Federal question was involved.

In the Kuykendall case the Court was asked to hold that the matter of reviewing a valuation on property of a utility was a legislative and not a judicial function and that, therefore, the action of the commission must be subjected to the court review provided for by state statute before resorting to the Federal Court. The Commission in that case contended that the Constitution of the State of Washington did not authorize the Legislature to confer legislative powers upon the courts.

The court in speaking of this contention, said:

> "It is our duty to avoid expressing an opinion on such an issue under the Constitution of Washington, in the absence of a clear decision by its highest court, if we can do so; and we think we can."

The court then discussed the Washington Statute which prevents a supersedeas when a rate under attack has been in force for more than one year. It said:

> "Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a federal court of equity from suspending the daily confiscation if it finds the case to justify it."

The court then made this statement:

> "As we have declined to look into the validity of the legislative functions with which the Washington state courts are vested in the valuation sections, so we decline to examine the validity of these restraints upon those courts to grant stays in cases of rates.

> A litigant whose constitutional rights are being invaded and to whom a statute denies a supersedeas in the state tribunals, may properly base his application for equitable relief on the effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state constitution. Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 296, 65 L. Ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case.

It is this statement of the court that complainants rely upon here.

It is obvious that that case is not controlling here. There the contention was made that the statute denying a supersedeas was in conflict with the State Constitution. This Court in that case simply adhered to its policy of deciding Federal questions only. Whether a state statute conflicts with the State Constitution is a question which this court has always refused to consider.

But when the question arose as to whether a state statute denying a supersedeas was in conflict with the Federal Constitution as denying due process of law, the court had no hesitancy in passing upon the question and in declaring such a statute to be clearly unconstitutional.

Porter vs. Investors' Syndicate (supra).

Moreover the statement of the court must be read in conjunction with its statement that the procedure on appeal in the State Court was a part of the legislative fixing of rates.

In other words, there is justification for the presumption of the validity of a State Statute denying a stay when the reviewing court acts legislatively. There is no such justification when it acts judicially.

When the reviewing court acts legislatively it cannot declare a statute denying a stay unconstitutional.

It can do so when it acts judicially.

Hence, at the time of the Kuykendall and Porter cases, the court was correct in holding that a statute denying a stay until the legislative process is complete should be presumed valid so as to permit the Federal Courts to grant relief—they then having jurisdiction in such cases. But when the reviewing State Court acts judicially as here, it can as well determine the validity of a statute denying a stay as can the Federal Court.

And when the court has pronounced definitely on the validity of the statute as it has in the Porter case, there is no longer any necessity or excuse for relying upon presumptions.

Counsel has cited the case of Carey vs. Corporation Com., 9 Fed. Supp. 709 affirmed in 296, U. S. 452.

We agree with the decision of that case.

Under the Oklahoma Constitution and Laws the review of rate orders by the State Courts is legislative and not judicial and the Johnson Act deprives the Federal Courts of jurisdiction only where there is a judicial review by state courts as in Montana.

II.

Montana Courts Have Never Denied a Stay Pendente Lite

There is not a single ruling of the Supreme Court of Montana holding that the State Courts cannot grant injunctive relief in such cases.

True, the Supreme Court of Montana has had occasion to either quote the statute or recite its substance but never has that Court passed upon the question.

Counsel for Complainants rely upon the case of State ex rel Public Service Com. v. Great Northern Utilities, 86 Mont. 442, 284 Pac. 772, as sustaining the claim that the State Court is prohibited from issuing an injunction pendente lite. That case does not so hold.

It simply stated that the statute, in terms, so declares. In that case it appears that an action was brought in the state court and the utility "asked for an injunction pendente lite but did not urge its issuance." This was before Judge Horsky. After the injunction action was commenced the Commission commenced an action in Mandamus in the same court but before another department presided over by Judge Poorman to enforce the Commission's order. The Mandamus action was dismissed and the order of dismissal was sustained by the Supreme Court.

The court in that case said:

> "In the ordinary action challenging an order requiring a utility to lower its rates on the ground that the order is unjust and unreasonable, the only question presented on application for mandamus to enforce the rates pending final determination would be as to the constitutionality of the statute authorizing such enforcement. * * * As the question of the constitutionality of the statute prohibiting injunction and authorizing mandamus to compel obedience to the order pending final determination was properly before Judge Horsky on application for the injunction pendente lite and could be presented at any time in the action pending, * * * This question of the constitutionality of the statutes was not raised before Judge Horsky, as the utility did not urge the issu-

ance of an injunction pendente lite, and the commission could only raise the question by an application for mandamus in Judge Horsky's department in the same manner as it was raised in Judge Poorman's department."

Thus it will be seen that as late as 1930 the Supreme Court of Montana had suggested that the constitutionality of our statute denying a stay was an open question.

In the case of Billings Utilities Company vs. Pub. Serv. Com., 62 Mont. 21, the court did nothing more than to state what the statute provides.

The same is true of the case of State vs. District Ct., 53 Mont. 229, except that in this case the court construed the statute under consideration as not applicable to the kind of an order there being considered. Hence, it was unnecessary to make any comment upon the right of the court to stay the operation of a different kind of an order.

But in any case the court did not presume to pass upon the validity of the statute purporting to deny a stay.

But if by any stretch of the imagination it can be said that it has so held or intimated, then our position is that it did so before the decision in the Porter case and it would now be required to condemn the statute.

We fail to see anything in the statement of John E. Benton referred to on pages 16 and 17 of appellants' brief that is helpful in determining the question here involved.

Since reference to the debates in Congress has been made by counsel, it is well to note that a reference to the Congressional Record of the 73rd Congress 2nd Session Vol. 78, Part II, pages 1916-1917 discloses that Congress was dealing with particular reference to the Montana situation. Senator Johnson, the author of the Johnson Act,

in speaking for the bill read a lengthy letter written by the then counsel for the Board of Railroad Commissioners of Montana. The letter in part, as appears in the Congressional Record, reads:

> "We believe that as a matter of principle there exists no justification for the procedure that permits Federal judicial interference with the orders of a State administrative board until such time as adequate remedies available within the State have been exhausted. Public Utilities do not serve the public as a matter of constitutional right. The Supreme Court of the United States has affirmed the doctrine that a franchise to operate a public utility is not, like the general right to engage in lawful business, part of the liberty of a citizen. It being true that a public utility operates in a given State only by reason of a sovereign grant from the State, there appears to be no valid reason why disputes arising between the grantor of the franchise or privilege—the State—and the recipient thereof—the utility—should not be handled within the jurisdiction of the grantor, at least until the matter in controversy has been passed upon, on its merits, by the tribunal of the State having the final say, i.e., the highest appellate court. Then, if the utility is dissatisfied, it should have the right to a review of the strictly Federal question involved by the Supreme Court of the United States."

The letter then gives a review of a particular case (evidently the Great Northern Utilities case) and then proceeds:

> "This case illustrates how under present procedure the utility can play hide-and-seek with a State regulatory board. It is, as you know, the presently approved doctrine of the Supreme Court of the United States that State and Federal Courts have concurrent jurisdiction of cases of this sort and that a utility can proceed concurrently in both state and federal courts

> until a final judgment is entered in one when that judgment becomes conclusive in the other as res adjudicata. In other words, a public utility has the right to proceed concurrently in both State and Federal tribunals on questions of law involved and then it may discontinue proceedings in the tribunal where the rulings have been adverse or unfavorable. The usual grounds for abatement of an action that there is another pending between the same parties involving the same questions is of no avail nor does the doctrine of election apply. Irrespective of the annoyance and expenses that such procedure causes a State commission, the doctrine that permits it is unsound."

Other portions of the letter need not be copied here. It is of particular significance that Congress was seeking to correct a situation particularly affecting the State of Montana. The question then is did it accomplish something or did it do a useless and idle thing? Did it waste its time and the people's money in a vain attempt to remedy a particular situation? The Porter case was decided before the Johnson Bill was enacted. The members of Congress are presumed to have had knowledge of it and patterned its legislation accordingly. There is a plain, speedy and efficient remedy in the State Courts and that ends the jurisdiction in the Federal Courts.

III.

The Johnson Act Should Be Liberally Construed

The Johnson Act is not a grant of additional authority to the Federal Courts, but the object and purpose of Congress in enacting it was to deprive the Federal Courts of jurisdiction. It should be liberally construed to effectuate the Congressional purpose and object. Doubts should be

resolved against and not in favor of jurisdiction in the Federal Courts.

Oklahoma Nat. Gas Co. vs. Russell, 261 U. S. 290, 43 S. Ct. 353;
Louisville & Nashville Ry. Co. vs. Finn, 235 U. S. 601, 35 S. Ct. 146;
Cumberland Tel. & Tel. Co. vs. Louisiana Pub. Ser. Com., 260 U. S. 212, 43 S. Ct. 75.

This Court has warned against the extention of the Federal Court jurisdiction in Oklahoma Gas & Elec. Co. vs. Okla. Packing Co., 292 U. S. 386, 54 S. Ct. 732, wherein it said:

> "The three-judge procedure is an extraordinary one, imposing a heavy burden on Federal Courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended."

IV.

The Johnson Act Is Valid

While the point is not stressed it is suggested in the brief of counsel on p. 41 that the Johnson Act is unconstitutional.

There is no merit in that suggestion.

Mississippi Power & Light Co. vs. City of Jackson, 9 Fed. Supp. 564;
Levering & Garrignes Co. vs. Morrin, 71 Fed. 2d, 226;
Kline vs. Burke Const. Co., 260 U. S. 226, 67 L. Ed. 226.

In the last cited case the court said:

> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.
>
> Turner v. Bank of North America, 4 Dall. 6, 10; United States v. Hudson & Goodwin, 7 Cranch, 32; Sheldon v. Sill, 8 How. 441, 448; Stevenson v. Fain, 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases but it requires an act of Congress to confer it. The Mayor v. Cooper, 6 Wall, 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. The Assessors v. Osbornes, 9 Wall, 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun cannot well be described as a constitutional right."

V.

It may be suggested that appellees should have taken advantage of the proviso in Section 266 of the Judicial Code, U. S. C. A. Title 28, reading:

> "It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State

court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

We think that since the Johnson Act deprives the Federal Courts of jurisdiction it was not incumbent upon us to in any manner recognize its jurisdiction by seeking merely a stay in the Federal Court.

Moreover, we were confronted with the definite statement in the case of Union Light, Heat and Power Co. vs. Railroad Com. of Ky., 17 Fed. 2d. 143, that if we attempted to avail ourselves of the privileges of Section 266 under the circumstances here (the restraining order having been granted) we would be in contempt of the Federal Court.

VI.

Sec. 3880 R. C. M. 1921 Does Not Aid Appellant

Our state statute does not and cannot enlarge the jurisdiction of the Federal Court. In the complaint it is alleged that the Public Service Commission may be sued in the courts of the United States by virtue of the provisions of Sec. 3880, R. C. of Montana 1921. Sec. 3880 specifies the name of the Commission as the "Public Service Commission of Montana" and provides that "in the name as above set forth, it may sue and be sued in the Courts of the State and of the United States." This statute, as shown by its wording, was merely intended to provide by what name the Commission shall sue and be sued both in State and Federal Courts. The Legislature of Montana never intended by this section to usurp the province of Congress in an attempt to define the jurisdiction of the Federal Courts.

It simply provided, in effect, that, when by law it is proper to sue the Commission in either State or Federal Court, the action may be brought against it, naming it as the "Public Service Commission of Montana."

Likewise in that name it must sue if it becomes a plaintiff or complainant.

If Sec. 3880 is open to the construction that it is an attempt to define the jurisdiction of the Federal Court it would be invalid as an attempt to interfere with powers and duties vested exclusively in Congress.

Section 3880 deals only with the name by which the Commission must be sued. Its scope is not enlarged by the enactment of the Johnson Act, or by the failure of the Legislature of Montana to change it since the passage of the Johnson Act.

Even under the Johnson Act there may be many cases wherein it is proper to sue the Commission in the Federal Court. Now, as heretofore, such an action must be brought against the Commission in its proper name as provided in Section 3880 and that is the only effect that can properly be given to Section 3880.

We respectfully contend that the lower court's decision concurred in by (5) different Judges is correct and should be affirmed.

Respectfully submitted,

Raymond T. Nagle
Attorney General,

Albert H. Angetman
Counsel for Montana Railroad Commission,

Al Hansen
Attorneys for Appellees.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 39

MOUNTAIN STATES POWER COMPANY,
APPELLANT,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

FILED APRIL 23, 1936.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION

In Equity. No. 3004

MOUNTAIN STATES POWER COMPANY, a Corporation, Complainant,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA, THOMAS E. CAREY, Jerry J. O'Connell, and Leonard C. Young, as Members of and constituting said Commission; Elmer Holt, as Governor of the State of Montana; Raymond T. Nagle, as Attorney General of the State of Montana; F. F. Haynes, as County Attorney of Rosebud County, Montana, and The City of Forsyth, a Municipal Corporation, Defendants

BILL OF COMPLAINT—Filed October 1, 1935

To the Honorable the Judges of the District Court of the United States for the District of Montana:

Mountain States Power Company, a corporation, hereinafter designated as "the company," complains and says:

I

Mountain States Power Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is authorized to engage in business in Montana in accordance with the laws of the State of Montana, and is doing business in the State of Montana, with its principal place of business and principal address in Montana at Kalispell, Montana, and as such is a citizen and resident of the State of Montana.

The company is a public utility within the meaning of Section 3881, Revised codes of Montana, 1921. Sections 3879-3913, inclusive, Revised Codes of Montana, 1921, are

known as the "Public Service Commission Act." (Chapter [fol. 3] 52, Laws of Montana, 1913.) The company is subject to the jurisdiction of said Public Service Commission of Montana, exercised in conformity with said Act.

II

During all the times referred to herein the company has owned, operated and controlled, and now owns, operates and controls, plant, equipment and facilities for the transmission, delivery, furnishing and distribution to the public for hire, of electric energy for light, heat and power in the towns of Forsyth, Rosebud and Hathaway, all in Rosebud County, Montana, and in their immediate environs and commonly and collectively referred to as the "Forsyth District" by way of distinction from other areas, districts or territory served by the company in Montana.

The company's plant, equipment and facilities in said Forsyth District consist of electric distribution systems in the said towns of Forsyth, Rosebud and Hathaway, together with electric distribution lines in suburban areas adjacent thereto and electric transmission lines interconnecting each and all of said towns and areas and an electric transmission line from Horton in Custer County, Montana to Forsyth, in Rosebud County, Montana. Said Forsyth District is one complete electric operating unit or division and is and has been, as developed, so operated under the immediate supervision of one local manager and his staff with offices in said District. The Company serves approximately 600 customers in said Forsyth District.

The supply of electric energy distributed by the company to the public in the Forsyth District as aforesaid, is derived from two sources; (1) by purchase from an electric generating plant located at Miles City, Montana, connecting with the company's lines at Horton, Montana, approximately 34.5 miles east of Forsyth, Montana, and owned and operated by Montana-Dakota Power Company, a corporation, and (2) by production by the company at its own steam generating plant located in Forsyth, Montana. There exists [fol. 4] no relationship between the company and said Montana-Dakota Power Company except that of purchaser and seller, respectively, and the company is a stranger to any and all persons or corporations furnishing electrical energy to said Montana-Dakota Power Company.

The electric energy so purchased is delivered to the company's facilities at Horton, Montana and transmitted over the company's transmission system, and the electrical energy so produced is delivered to the company's facilities at Forsyth, Montana, and at said towns said energy, whether purchaser or produced, is distributed and delivered to patrons over the company's distribution systems local to each of said towns. In addition, the company furnishes, delivers and distributes electrical energy over its rural lines to patrons and consumers located intermediate to said points and in the vicinity of each thereof. Service to the inhabitants of each of said towns and suburban areas is rendered by the company under one uniform schedule of rates for the various classes of service.

III

The defendant, Public Service Commission of Montana, is an administrative tribunal of the State of Montana, created by the Act (Chapter 52, Laws of Montana, 1913) of the legislative assembly of Montana, aforesaid, and by the specific provisions of Section 3880, Revised Codes of Montana, 1921, may "be sued in the courts of the State and of the United States." That said Public Service Commission of Montana is composed ex officio of the three members of the Board of Railroad Commissioners of Montana.

The defendants, Thomas E. Carey, Jerry J. O'Connell and Leonard C. Young are the duly and regularly elected, qualified and acting members of and constitute the Board of Railroad Commissioners of Montana and ex-officio the Public Service Commission of Montana, established by the Act aforesaid.

IV

That the said Public Service Commission of Montana [fol. 5] exercises jurisdiction over the valuations, and the rates, schedules and charges made by this company for electric energy, distributed and sold by it in the said Forsyth District.

V

The defendant, F. H. Cooney, is the duly qualified and acting Governor of the State of Montana, charged as the executive thereof with the enforcement of the laws of said

State and made a party hereto pursuant to the provisions of Section 266, United States Judicial Code, as amended on February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938, (28 U. S. C. A., Section 380). That said F. H. Cooney, acting Governor of the State of Montana, did not participate in any of the proceedings herein mentioned and was not a party thereto.

VI

The defendant, Raymond T. Nagle, is the duly elected, qualified and acting Attorney General of the State of Montana, and together with the members of the said Public Service Commission of Montana, is charged with the enforcement of the said Public Service Commission Act. That said Attorney General, Raymond T. Nagle, did not participate in any of the proceedings herein mentioned and was not a party thereto.

VII

The defendant F. F. Haynes is the duly and regularly elected, qualified and acting County Attorney of Rosebud County, Montana. That said F. F. Haynes did not participate in any of the proceedings herein mentioned as said County Attorney and said County of Rosebud was not a party thereto. That said defendant F. F. Haynes participated in said proceedings as counsel for the City of Forsyth, Montana.

VIII

The defendant City of Forsyth is a municipal corporation duly and regularly organized and existing under and by virtue of the laws of the State of Montana.

The said County Attorney is charged, ex officio, with the [fol. 6] enforcement of said Public Service Commission Act under said defendant Attorney General in the county of Rosebud, as aforesaid.

IX

Each and all of said defendants are residents and citizens of the State of Montana. This is a civil suit in equity and the matters in controversy and in question herein arise under the Constitution and laws of the United States of America, as hereinafter more specifically alleged and the

sum in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

X

That on or about April 18, 1935, pursuant to a so-called petition for rehearing theretofore filed by the defendant City of Forsyth, alleging that the rates of the company at Forsyth, Montana were unreasonably high, unjust and discriminatory, etc., and that rate reductions prescribed by said Commission for the company in the Forsyth District on December 7th, 1934, (to be effective January 1, 1935) after public hearing at Forsyth on November 9th, 1934, were unfair and unjust, said Commission in its Docket No. 1771, served the company with a Notice of Hearing on said complaint, setting the time therefor on May 23rd, 1935, at Forsyth, Montana. Pursuant to such notice a hearing was had before said Commission, commencing on the date aforesaid at Forsyth, Montana. At said hearing the company presented to said Commission, sworn, competent and material evidence and exhibits in full support and complete justification of its existing rates and property values, and submitted its business to the examination and scrutiny of said Commission and said complainant City of Forsyth. There was not presented to the Commission any substantial, relevant, competent or material evidence or testimony in support of the allegations of said petition for rehearing (whether treated as a complaint or otherwise) nor in dispute or contradiction of complainant's evidence, testimony and exhibits so presented.

On or about September 23rd, 1935, said Commission, [fol. 7] issued Report and Order No. 1668 in said Docket No. 1771, wherein and whereby said Commission purported to fix the present fair value of the company's property, used and useful in serving the consumers of electricity in the "City of Forsyth and Rosebud" and ordered certain material reductions in the existing rates of the company in said places. A full, true and correct copy of said Report and Order No. 1668 is attached hereto, marked Exhibit "A" and by this reference made a part hereof.

XI

Pursuant to the provisions of Sections 3884 and 3895, Revised Codes of Montana, 1921, which provide that the

Commission shall value all the property of every public utility used and useful for the convenience of the public, the company made, prepared and submitted to the Commission and offered in evidence at the said hearing before the Commission a complete detailed inventory and appraisal of its electrical property in said Forsyth District. Said inventory and appraisal was prepared with great care, in great detail, and by competent and experienced electrical valuation engineers; inspection and a count of all physical property, so far as the same could be examined, was made in the field; and a study, determination and report was made of the cost of reproduction of said property as of December 31st, 1934, including proper allowances for materials and supplies, working capital, going concern value and other elements of value of $235,737.00 upon the basis of reproduction new as of that date; and found, claimed and supported a value of $206,864.00 upon a basis of reproduction new less accrued depreciation.

In addition to presenting evidence with respect to reproduction cost new and reproduction new less accrued depreciation, the company prepared and submitted to the Commission and offered in evidence at said hearing before the Commission, an exhibit and supporting testimony disclosing the book cost of the property in the Forsyth District [fol. 8] as of December 31, 1934, to be the sum of $250,833.37.

Although received in evidence, these valuations and competent supporting testimony upon the part of the company were given no consideration by the Commission, thus giving no effect whatsoever to any part of the evidence introduced by the company with respect to the value of its property in said Forsyth District.

No substantial, detailed evidence was offered by the complainant City of Forsyth (or any other party except the company as hereinbefore and hereafter alleged) in said proceeding before the Commission with respect to the cost of reproduction, cost of reproduction new less depreciation or book value of the company's property current at the time of inquiry or during any time covered by the proceedings before the Commission.

The Commission did not offer or attempt to offer, any evidence with respect to said elements of value of the company's property, or any other criteria, or any phase of the valuation.

XII

The present fair value of the company's properties used and useful for the convenience of the public in said Forsyth District in the State of Montana and as the same existed and was in service on December 31, 1934, (and now exists and is now in service, exclusive of net additions and betterments made since December 31, 1934), was on said date and now is in excess of $206,864.00 (including the steam generating plant at Forsyth, Montana and including working capital, material and supplies, going concern value and other proper and lawful elements of value), whereas said Commission fixed said value as of December 31, 1934 as "not exceeding the sum of $90,000.00." If said steam generating plant at Forsyth, Montana were excluded, the remaining fair value as above indicated would be in excess of $155,041.30.

[fol. 9]

XIII

The value of $90,000.00 set by the Commission in its said Report and Order No. 1668 was and is unreasonable, arbitrary and confiscatory in that the Commission has failed and refused to consider or find the present true fair value of the company's property in said Forsyth District; in that the Commission has omitted from consideration and result property used and useful in serving consumers of the company at Hathaway, Montana, in said Forsyth District; and in that the order is not supported by the evidence given in said cause, is contrary to law, is contrary to the facts, is unfair, unreasonable, evasive, confiscatory and void.

XIV

The Report and Order No. 1668 of the Commission is further unreasonable, arbitrary, capricious, confiscatory, unfair, evasive and void in that the Commission has wholly failed and refused to make any findings of fact whatsoever supporting its said order with respect to the value of the company's property; in that through such failure and refusal to make findings of fact as to material or any elements of value going to make up ultimate fair value, it has disregarded the rights of the company, making it impossible to determine or ascertain the allowance, if any, so found or made by the Commission for any element of value or

whether any allowance whatsoever was made for any particular material, proper and lawful element of ultimate fair value; and in that by its failure to so make findings of fact with respect to value and elements of value, it has displayed a plain intent to make impossible of determination the consideration or weight it gave to the evidence of the company upon the following elements of value, to-wit: cost of reproduction, cost of reproduction less accrued depreciation, book value, working capital, materials and supplies and/or going concern value and other material proper and lawful elements of value, all of which are essential elements in a proper and lawful determination of the present fair value [fol. 10] of the property. The action of the Commission described in this paragraph in making its Report and Order wholly without and in disregard of findings of fact in support thereof, is unlawful procedure and denies to the company its right to a determination in a lawful manner of the present fair value of its said property.

Good conscience and equity dictate, contemplate and require that there should be a full and frank disclosure by the Commission of its methods of valuation and that through the making of findings of fact with respect to value and elements of value, ample opportunity shall be afforded to question and contest the methods actually employed and the principles applied. The failure, refusal and neglect of the Commission so to do, has resulted in denying to the company due process of law or equal protection of the law since it hinders and disables the company from attacking the specific errors and omissions made by the Commission and permits only challenge of the erroneous final result.

XV

The value of $90,000.00 so determined by the Commission was determined for the purpose of fixing, establishing and regulating the rates and earnings which the company will be permitted to charge and collect for electric service and for the use of its property and said Commission has in its said Report and Order No. 1668, used and applied, and will in the future use and apply, the said value or rate base unless restrained by order of this court.

Insofar as the value or rate base so determined by the Commission is less than the true and lawful present fair value of the Company's property, to-wit, the difference be-

tween $90,000.00 and $206,864.00 (or $155,041.30) as heretofore alleged, said property will be used in public service without any compensation therefor and will be confiscated and taken without due process of law unless restrained by order of this court.

The Commission will have occasion to and is required by [fol. 11] the provisions of Section 3899, Revised Codes of Montana, 1921, to, from time to time, consider, fix, establish and adjust rates of the company and in any such proceeding the company will be seriously prejudiced by the facts of said inadequate and invalid valuation of its property so heretofore made by the Commission and the same will be considered by the Commission as the vital, pivotal and controlling factor in so fixing and establishing such rates. In any such proceeding it will be impractical to secure a reconsideration or redetermination by the Commission of its prior valuation of the company's property and no remedy will be available to the company in respect of said inadequate and invalid valuation in connection with such proceeding or at all. Said Commission has in fact by its said Report and Order No. 1668 so attempted to apply said inadequate and invalid valuation in reducing the rates and earnings of the company as hereinafter more fully set forth.

XVI

The company at the time of the hearing hereinbefore referred to was and continuously from January 1, 1935, to the date of said hearing, had been distributing, delivering and selling electric energy for public and private consumption and use in the towns and areas aforesaid under rates and charges approved and concurred in by the Public Service Commission of Montana, all of which said rates and charges have been in full force and effect since January 1, 1935, pursuant to approval of the said Public Service Commission of Montana. By its said Report and Order No. 1668, the Commission ordered the company to reduce its said existing rates on an average of approximately 24.31% to a schedule of rates and charges set forth in detail in said Report and Order No. 1668 (Exhibit "A"). The application of said reduced rates and charges will, on the basis of the 1934 business of the company, reduce its annual gross electric revenue of $46,211.44 under existing rates to $34,977.84

under the reduced rates, or a reduction of $11,233.60 per year.

[fol. 12] Under existing rates and on the basis of 1934 business the net return of the company in the Forsythe District does not exceed 4.59% upon a rate base or value of $206,864.00, and such return does not exceed 7.71% upon a rate base (book cost with steam plant eliminated) of $155,041.30. Said rate bases or values of $206,864.00 and $155,041.30 being the minimum rate bases or values hereinbefore referred to and being the lowest possible rate bases or values justified by the record before the Commission in the proceeding culminating in the entry of the Report and Order No. 1668 (Exhibit "A"). Applying the reduced rates as ordered by the Commission to said minimum value or rate base of (1) $206,864.00, the company would sustain a loss in revenue of $1,742.35 per year and will fail to earn anything for return by such amount; and applying said reduced rates to said minimum value or rate base of (2) $155,041.30, the company will receive for a total return on its investment, $720.91 per year or less than one-half of one per cent. Under this computation the company's expenses, inclusive of allowance for depreciation at 3.6% per year, exceed the annual gross electric revenue by $1,742.35 in the first instance and exceed annual expenses including said depreciation by only $720.90 in the second instance.

Applying the reduced rates as ordered by the Commission to the valuation of $90,000.00 as determined by the Commission, the Company would be operating with a net revenue of $2,530.32 per year; and in addition it will lack $14,500.00 per year in earnings for the amortization of its property as next alleged.

XVIII

In addition to the ruinous and confiscatory losses in revenue and earnings which the company would sustain if it were required to accept said valuation of $90,000.00 and the reduction in rates as ordered by the Commission, as heretofore pleaded, the company would sustain other, further and confiscatory losses by reason of the requirement of amortizing and retiring from its fixed capital accounts that portion thereof representing the difference between [fol. 13] $235,822.01 (the fixed capital as of December 31,

1934) and said Commission valuation of $90,000.00—or $145,822.61. Assuming such amortization should be accomplished within a period of ten years, the amount to be written off and retired would approximate $14,500.00 per year.

XIX

As heretofore alleged the Commission made no findings of fact in support of its conclusions and order. That portion of Exhibit "A" other than the order proper, has no designation but appears to be a general statement of the proceeding before the Commission with brief reference to certain issues presented. It is therefore impossible for the company to take specific exception to definite and designated findings.

Reference is made in said discussion in Exhibit "A" to the steam generating plant located at Forsyth, Montana, and to a hypothetical return of 12% on the Commission's alleged rate base of $90,000.00 (by the company contested herein) on the basis of alleged operating results for the year 1934, and the assertion is made that the Commission believes its rate order will produce a fair return, etc. The company excepts to each of these statements and alleges that each of said statements are contrary to the evidnece of record before said Commission and are not supported by the record.

XX

Said valuation of $90,000.00 and any schedule of rates and charges promulgated in accordance with the Report and Order No. 1668, and each of them, is confiscatory, unlawful, unreasonable and void and the enforcement thereof and threatened continuance of said enforcement, as hereinafter alleged, has deprived, now deprives and will continue to deprive the company of its property without due process of law and deny to the company the equal protection of the law, all in violation of the Fourteenth Amendment to the [fol. 14] Constitution of the United States of America, in that to force and compel this company to sell and distribute electric energy as hereinbefore provided, under said valuation and/or under said report and order and/or under any schedule of rates and charges promulgated in accordance

therewith, would be and is a confiscation of the property of this company, used and useful in the sale and distribution of electric energy in said Forsyth District.

XXI

By the terms of said Report and Order No. 1668, which was served upon the company on September 27th, 1935, the company was and is required to comply therewith on or before October 1st, 1935.

On September 28th, 1935, the company filed with the Commission a petition for rehearing of the issues, matters and things involved in said Report and Order No. 1668, Docket No. 1771, of said Public Service Commission of Montana together with an application for the suspension and stay of said Report and Order, pending such rehearing. A full, true and correct copy of said petition and application is attached hereto, marked Exhibit "B" and by this reference made a part hereof.

On September 30th, 1935, said Commission made and entered its order denying both said petition for rehearing and application for stay. A full, true and correct copy of said order is attached hereto, marked Exhibit "C" and by this reference made a part hereof.

XXII

The company is prevented by Section 3906, Revised Codes of Montana, 1921, from obtaining a supersedeas, temporary restraining order and an injunction pendente lite in the courts of the State of Montana, to prevent or restrain the enforcement of the Report and Order No. 1668 with respect to the schedule of rates and charges promulgated by the said Public Service Commission of Montana.

XXIII

The Company has no plain, speedy or adequate remedy [fol. 15] at law and the defendants, the Commission, the Attorney General, and the County Attorneys threaten to, and will apply and/or enforce and will continue to apply and/or enforce said Report and Order and the company will be forced and compelled to submit to the confiscation of its property without due process of law and without the equal protection of the laws and in violation of its rights

under the Constitution of the United States unless the defendants, through the interposition of the equitable jurisdiction of this court are restrained from so applying and/or enforcing said Report and Order.

XXIV

The company, its officers, agents and employees are required at the risk of heavy, excessive and unreasonable penalties as provided in Sections 3888 and 3908, Revised Codes of Montana, 1921, to comply with said Report and Order. Failure to comply with said Report and Order and to submit to the confiscation of its property as hereinbefore alleged, will subject the company to a multiplicity of suits at the instance of both said defendants and of many of the company's patrons upwards of 600 in number in the Forsyth District.

The issues which will be presented in each of said multiplicity of suits are presented and can and should be decided and determined in this suit. The application and/or enforcement of said Report and Order by the defendants will result in the total loss of revenue to the company which cannot be recovered in any reasonable manner and such loss of revenue will cause the company to suffer great and irreparable damage. If said rates and charges promulgated by said Commission and set forth in said Report and Order are allowed or permitted to become effective forthwith as ordered and the company should prevail upon final decree herein, the company could not recover the sums to it lost and withheld by its customers under said reduced rates except in rare instances and the company would in many [fol. 16] instances be required to sue therefor subjecting itself and this honorable court to a multiplicity of suits for such purpose, few of which, because of the expenses involved, would pay for their prosecution with the result that said loss of monies under the rates and charges promulgated in said Report and Order would be irreparable.

XXV

The company, in connection with its prayer for a temporary restraining order herein, offers to do equity by:

(a) Impounding the revenues collected by it from its customers from the sale of electric energy on the basis of its existing rates and charges in excess of the rev-

enues which would accrue to the company by the application of the schedule of rates and charges promulgated pursuant to the requirements of said Report and Order, with the Clerk of this Court, or in any bank or depository designated by this court, subject to the order and disposition of this court as to the accounting to customers therefor, or any other details; or

(b) Post and file a bond in such sum and with such surety as to this court may seem adequate, to be approved by the Judge hereof, conditioned that if it shall be held by final and permanent decree herein that said Report and Order, and the rates and charges therein embodied are lawful and not confiscatory, the Company will refund to its customers the excess paid by its customers under and in accordance with the provisions of its existing schedules over and above the rates and charges provided by said Report and Order.

Wherefore, the complainant company prays:

First. That the value of $90,000.00 determined in said Report and Order of said Commission of September 23, 1935, be decreed to be in violation of the Fourteenth Amendment to the Constitution of the United States and the Report and Order imposing the same, to be void.

Second. That the schedules of rates and charges promulgated and set forth in said Report and Order of said Com- [fol. 17] mission be decreed to be unjust, unreasonable, unlawful and void and the Report and Order imposing the same to be void and that said rates and charges and the Report and Order promulgating the same be decreed to be in violation of the Fourteenth Amendment to the Constitution of the United States.

Third. That the existing and presently effective schedules, rates, charges, classifications, rules and regulations of the company as filed with the Public Service Commission of Montana be decreed and declared to be the just, fair, reasonable and effective schedules, rates, charges, classifications, rules and regulations of the company for electric service in the Forsyth District in Montana and that the company be permitted to continue to charge and apply the same.

Fourth. That a temporary restraining order issue from this court under the seal thereof, effective forthwith, upon such terms as to the court may seem proper and made operative until hearing on application for interlocutory injunction or until the further order of the court, directed to the said defendants, and each of them, restraining and enjoining the said defendants, and each of them, and/or their successors in office and all persons acting in aid of said defendants, or either of them, or their successors in office, or by their authority from: (a) enforcing, or attempting to enforce by mandamus, by action at law, by suit in equity, by criminal proceedings, by suit to enforce penalties, or in any other manner the said Report and Order No. 1668 of the defendant Commission or any part of said Report and Order, or the schedules of rates and charges promulgated and proposed to be put into effect by the Commission in said Report and Order No. 1668, or each or any of such schedules, rates or charges; (b) from in any way restraining, interfering with or preventing the company from applying and collecting the rates, charges, classifications, rules and regulations contained in the company's [fol. 18] existing tariffs on file with said Commission and applicable in said Forsyth District in Montana.

Fifth: That an interlocutory injunction issue from this court, under the seal thereof, effective upon such terms as to the court may seem proper and operative until the issuance of a permanent injunction or other final disposition of this cause, directed to the said defendants, and each of them, restraining and enjoining the said defendants, and each of them, and/or their successors in office and all persons acting in aid of said defendants, or either of them, or their successors in office, or by their authority from: (a) enforcing, or attempting to enforce by mandamus, by action at law, by suit in equity, by criminal proceedings, by suit to enforce penalties, or in any other manner the said Report and Order No. 1668 of the defendant Commission or any part of said Report and Order, or the schedules of rates and charges promulgated and proposed to be put into effect by a majority of the Commission in said Report and Order No. 1668, or each or any of such schedules, rates or charges; (b) from in any way restraining, interfering with or preventing the company from ap-

plying and collecting the rates, charges, classifications, rules and regulations contained in the company's existing tariffs on file with said Commission and applicable in said Forsyth District in Montana.

Sixth. That upon final hearing the said interlocutory injunction be made permanent and perpetual.

Seventh. That the complainant company have such other and further relief as may be just and equitable in the premises.

May it Please Your Honors to grant unto the complainant company a Writ of Subpoena of the United States of America, issuing out of and under the seal of this Honorable Court directed to the said defendants, Public Service Commission of Montana, Thomas E. Carey, Jerry J. O'Connell and Leonard C. Young, as Members of and constituting said Commission, F. H. Cooney as Governor of the State of Montana, Raymond T. Nagle as Attorney [fol. 19] General of the State of Montana, F. F. Haynes, as County Attorney of Rosebud County, Montana, City of Forsyth, Montana, a municipal corporation, commanding them, and each of them, on a day certain, to be named therein and under a penalty to be and appear before this Honorable Court then and there to answer, but not under oath, answer under oath being hereby expressly waived, all and singular the premises and to perform and abide by such orders, direction or decree as may be made against them in the premises.

And the complainant company will ever pray.

Mountain States Power Company, by E. G. Toomey, Residing at Helena, Montana; T. W. Carolan, Residing at Forsyth, Montana; Hance H. Cleland, Residing at Olympia, Washington; Raymond W. Clifford, Residing at Olympia, Washington, Its Solicitors and Attorneys.

Duly sworn to by E. G. Toomey. Jurat omitted in printing.

[fol. 20] EXHIBIT "A" TO BILL OF COMPLAINT

BEFORE THE PUBLIC SERVICE COMMISSION OF MONTANA

Docket No. 1771

In re Rates Charged by the Mountain States Power Company, Forsyth, Montana

Report and Order No. 1668

Hearing: May 23, 1935.
Decided: —— —, ——.

Appearances:

For the Mountain States Power Company: Hance H. Cleland, Attorney, Albany, Oregon; E. G. Toomey, Attorney, Helena, Montana; T. W. Carolan, Attorney, Forsyth, Montana.

For the City of Forsyth: F. F. Haynes, Attorney, Forsyth, Montana.

For the Commission: Albert H. Angstman, Counsel, Helena, Montana.

Before Chairman Carey and Commissioners O'Connell and Young at Forsyth, Montana

[fol. 21] By the COMMISSION:

The City of Forsyth filed a complaint before the Public Service Commission, alleging that the rates charged by the Mountain States Power Company for electric energy to the people of Forsyth are excessive. The Commission set the matter down for hearing at the City of Forsyth and took testimony offered by all interested parties. On the 7th day of December, 1934, the Commission made an order making slight reductions in some of the rates. The City of Forsyth being dissatisfied with the Order filed a Complaint in the District Court of Rosebud County, complaining of the Order made by the Commission. In the meantime one of the Commissioners who had participated in the decision retired from office and was succeeded by Jerry J. O'Connell. Shortly after filing the complaint in the District Court the City filed an application with the Public Service

Commission for a rehearing; of the matter before the Board. The Board granted the rehearing and the Court Proceedings were thereupon dismissed. The Commission thereupon set the matter down for hearing for the taking of further testimony at Forsyth. The hearing was held in the City of Forsyth on the 23rd day of May, 1935, and further evidence was offered by both parties to the proceeding and it was stipulated that the record of the evidence introduced in the first hearing should become a part of the record at the second hearing.

No useful purpose would be subserved in a detailed review of all the evidence in the case. It appears that the Mountain States Power Company purchases electric energy from the Montana-Dakota Power Company and serves it to the people in Rosebud and Forsyth. It maintains a standby plant in the City of Forsyth which has not been used for a number of years for generating electricity and which so far as the customers of this utility are concerned is of no benefit to them in obtaining electric energy. As a part of the generating plant at Forsyth the Company operates a steam heating plant and furnishes heat to the general public in the City of Forsyth, but the entire plant outside of the switchboard is neither used nor useful in serving customers of electric energy in the City of Forsyth or Rosebud and must therefore be eliminated from our consideration of this case.

The Commission finds from a review of the entire evidence in the case that the property used and useful in serving the consumers of electricity in the City of Forsyth and Rosebud has a valuation for rate-making purposes of not exceeding the sum of $90,000.00. There is ample evidence in the record to warrant us in finding that the value is much less than $90,000.00. The Company in 1934 had a gross operating revenue of $49,268.65. Its total operating expenses including depreciation and taxes amounted to $37,535.95, leaving a net operating revenue of $11,732.70. On a valuation of $90,000.00 the Company earned a return of approximately 12% on the total value of its property if we consider that value as being $90,000.00. On the whole record before us the Commission finds that the rates should be substantially reduced and submits herewith its Order reducing some of the schedules which the Commission believes should be given a test for a trial period and which it believes will produce a fair return to the Utility Company

on the fair value of its property used and useful in serving its customers.

Order

At a session of the Public Service Commission of Montana held in its offices in the Capitol Building, Helena, Montana on the 23rd day of September, 1935, present Chairman Carey and Commissioners O'Connell and Young, there regularly came before the Commission for final action the [fol. 22] matters and things involved in Docket No. 1771, City of Forsyth, Complainant, against the Mountain States Power Company, Respondent, and it appearing that all matters and things involved therein have been duly investigated and a public hearing had whereat all persons interested had opportunity to appear and present their respective interests, and, now, the Commission being fully advised in the premises,

It is ordered by a unanimous vote of the Commission upon motion of Commissioner O'Connell; seconded by Commissioner Carey, that the Mountain States Power Company, Respondent, shall on or before the 1st day of October, 1935, file with the Commission schedules of rates for residential and commercial lighting, general heating, and electric service at Forsyth and Rosebud, Montana, and for electric general power service and for short-term power service and for street lighting and power rates for service at Forsyth, and Rosebud, Montana, effective as of the 1st day of October, 1935, and until further order of the Commission, which said schedules of rates shall be embodied in tariffs known respectively as Schedule "A" sheet No. 4 and Schedule "B" sheet No. 5, Schedule "D" sheet No. 2, Schedule "E" sheet No. 6-2, Schedule "F" sheet No. 2, Schedule "H" sheet No. 2-B, as follows, to-wit:

Schedule "A" sheet No. 4 cancelling sheet No. 3, Residential Electric Service available for:

Residential lighting and may include all heating and cooking equipment and single phase motor driven appliances and devices.

Classification:

For customers premises strictly classified as private households and shall not be applicable to rooming houses and club rooms. It may, however, apply to residen-

tial occupants in apartment houses where the occupant is directly responsible to the Power Company for electric service used in the apartment occupied by it.

Rate:

First 25 KWH per month @ 8¢ per KWH.
Next 50 KWH per month @ 4¢ per KWH.
Excess KWH per month @ 3.5¢ per KWH.

Prompt Payment Discount: None.
Minimum Bill: $1.00 per month.

Schedule "B" sheet No. 5 cancelling sheet No. 4, Commercial and Industrial Lighting:

Available for: All classes of Commercial Lighting and including incidental socket appliances for which service is not otherwise available under Schedules "D", "E", and "K".

Classification:

For all Commercial and Industrial Customers.

Rate:

First 100 KWH per month @ 8¢ per KWH.
Next 400 KWH per month @ 6¢ per KWH.
Next 1000 KWH per month @ 4¢ per KWH.
Excess KWH per month @ 2¢ per KWH.

Prompt Payment Discount: None.
Minimum Bill: $1.00 per month.

[fol. 23] Schedule "D" sheet No. 2 cancelling sheet No. 1, General Heating:

Available for: Air and water heating, drying and baking and any other heating purposes electricity may be put to.

Rate: 3½¢ per KWH.

Prompt Payment Discount: None.
Minimum Bill $1.00 per month.

Schedule "E" sheet No. 6-2 cancelling sheet No. 6-1, Electric "General Power".

Available for Commercial and Industrial Power.

Rate:

First 200 KWH per month @ 6¢ per KWH.
Next 200 KWH per month @ 5.5¢ per KWH.
Next 200 KWH per month @ 5¢ per KWH.
Next 200 KWH per month @ 4.5¢ per KWH.
Next 2200 KWH per month @ 3¢ per KWH.
All over 3000 KWH per month @ 2¢ per KWH.

Determination of Connected Load: Shall be in accordance with Rule 13 as prescribed in "Standards for Electric Service" and as made effective on December 1, 1921 by Public Service Commission of Montana.

Special Terms and Conditions: Lighting and heat, necessary in connection with industrial power, not to exceed 25% of the total monthly KWH used for all purposes, may be billed at the above power rate, provided that consumer agrees not to use in excess of 25% of connected horsepower between the hours of 5:30 and 9:00 P. M. Service under this schedule for power installations may, at the option of the Power Company, be furnished to a single customer at more than one point of delivery. Power under schedule "H" may be billed under this schedule at option of customer.

Prompt Payment Discount: None.

Minimum Bill:

$1.00 per month for power installations of 5 H. P. or less.
$2.50 per month for power installations more than 5 H. P.

Schedule "F" sheet No. 2 cancelling sheet No. 1, Short-Term Power.

Available for: This rate applies to power service for pumping water for irrigation and for other purposes requiring power for less than twelve (12) months per year.

Rate:

First 200 KWH used per month @ 6¢ per KWH.
Next 200 KWH used per month @ 5½¢ per KWH.
Next 200 KWH used per month @ 5¢ per KWH.
Next 200 KWH used per month @ 4½¢ per KWH.
Next 200 KWH used per month @ 4¢ per KWH.
All over 1000 KWH used per month @ 3½¢ per KWH.

Discount: None.
Minimum Bill: $1.00 per month.

[fol. 24] Schedule "H" sheet No. 2-b cancelling sheet No. 2-a, Street Lighting and Power Rates.

Available for: Power Service: one 75 horse power motor used for the pumping of the City's water supply, and for the two (2) 15 horse power motors now in service in the City's sewerage disposal plant all of said motors to be in continuous service throughout the year.

Rate: 3¢ per KWH.

Discount: None.

Minimum Bill: $50.00 per month.

It is further ordered that the Secretary shall serve a true copy of this Order upon each of the parties hereto and that the same shall be in full force and effect from and after the 1st day of October, 1935, according to its terms.

Thomas E. Carey, Chairman. Jerry J. O'Connell, Commissioner. Leonard C. Young, Commissioner.

Attest: Official Albert H. Angstman, Counsel. (Seal.)

[fol. 25] EXHIBIT "B" TO BILL OF COMPLAINT

BEFORE THE PUBLIC SERVICE COMMISSION OF MONTANA

Docket No. 1771

In re Rates Charged by the Mountain States Power Company, Forsyth, Montana

PETITION FOR REHEARING AND STAY

Comes now Mountain States Power Company, a corporation, Respondent in the above entitled and numbered docket, and having been served on Friday, September 27th, 1935, with copy of Report and Order No. 1668, in said entitled and numbered docket, issued by said Commission, hereby respectfully petitions your Honorable Commission for a rehearing and stay upon its said Report and Order No. 1668 on the following grounds:

(1) That the Report and Order is contrary to the evidence in the prescription of the rates and charges therein ordered substituted for existing rates and charges heretofore lawfully approved by said Commission.

(2) That the conclusion in the Report and Order, "that the property used and useful in serving the consumers of electricity in the City of Forsyth and Rosebud has a valuation for rate-making purposes of not exceeding the sum of $90,000.00," is contrary to and is without support in the record before the Commission and is wholly unwarranted by the evidence.

(3) That as shown by the evidence of record in this proceeding, the reduced rates as prescribed and the application of the various elements of revenue and expense result in a wholly inadequate return of earning to respondent, upon the fair value of its property, irrespective of the inclusion or exclusion of the steam generating plant located in the town of Forsyth, Montana.

(4) That said report in its conclusions with respect to the value of respondent's property and in its conclusions [fol. 26] with respect to a fair return thereon, denies this respondent due process of law, confiscates respondent's property and if this respondent is not relieved therefrom, immediately impairs and must directly and inevitably ruin respondent's capacity to render reasonably adequate service in the Forsyth district or any service therein.

(5) That the said Report and Order on its face, by its terms, and the manner of its issuance and prescribed effective date is arbitrary, capricious and indicates complete want of administrative fairness and elemental justice.

Wherefore, your respondent respectfully prays your Honorable Commission to reconsider the matter and things involved in said Docket No. 1771 above entitled and grant this respondent, and all concerned, a rehearing thereon and that pending decision of such rehearing, your Honorable Commission forthwith enter its order completely staying and arresting the provisions of said Report and Order No. 1668 until the further Order of the Commission after completion of full proceedings on rehearing.

Done and Dated this 28th day of September, 1935.

Respectfully submitted, Mountain States Power Company, by E. G. Toomey, Cleland and Clifford, Its Attorneys. Of Counsel: Toomey and McFarland.

[fol. 27] STATE OF MONTANA,
County of Lewis and Clark, ss:

E. G. Toomey, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for Mountain States Power Company in the above entitled proceeding and that he makes this verification for and on behalf of said corporation for the reason that none of the officers thereof are at present within the County of Lewis and Clark, State of Montana; that he has read said Petition for Rehearing and knows the contents thereof and that the matters and things therein stated are true of his own knowledge.

E. G. Toomey.

Subscribed and sworn to before me this 28th day of September, 1935. Cecelia D. Everett, Notary Public for the State of Montana, Residing at Helena, Montana. My commission expires March 10, 1938. (Notarial Seal.)

[fol. 28] EXHIBIT "C" TO BILL OF COMPLAINT

BEFORE THE PUBLIC SERVICE COMMISSION OF MONTANA

Docket No. 1771

In re Rates charged by the Mountain States Power Company, Forsyth, Montana

Order Denying Petition for Rehearing and Stay

The Petition of Mountain States Power Company for a rehearing and for a stay of the Report and Order No. 1668 in the above entitled Docket, coming on regularly for hearing, and the Commission having heard and considered the said petition and the arguments of counsel in support thereof, and being otherwise fully informed in the premises, it is now,

Ordered: That said Petition for rehearing and stay be, and the same is hereby denied.

Done and Dated at Helena, Montana, this 28th day of September, 1935.

Thomas E. Carey, Chairman; Jerry J. O'Connell, Commissioner; Leonard C. Young, Commissioner, Being and Constituting the Board of Railroad Commissioners of the State of Montana, ex Officio Public Service Commission of Montana.

Attest: Official Albert H. Angstman, Secretary.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN FORD—Filed October 1, 1935

STATE OF OREGON,
County of Linn, ss:

John Ford, being first duly sworn, on oath deposes and says:

I make this affidavit in support of the application of the Company for a preliminary restraining order of the report and Order No. 1668 of the Public Service Commission of Montana, more particularly referred to in the Bill of Complaint in the above entitled cause.

I am now, and have been for the past three years, Assistant Secretary of Mountain States Power Company, a corporation. I was for over three years prior to my election to that position a member of the accounting staff of said corporation. I am familiar with the books, records and accounts of the corporation and exercise supervision of the detail of all accounting matters with respect to the corporation's accounts, including such accounts applicable in the Forsyth-Rosebud district. Books, records and accounts of Mountain States Power Company, with respect to the operations of that Company in the State of Montana, are kept in accordance with the classification of accounts presented by the Public Service Commission of Montana.

I was personally present at the hearing before the Public Service Commission of Montana at Forsyth, Montana, commencing on the 23rd day of May, 1935, involving the valuation and rates of the Company in the Forsyth-Rosebud district.

I am familiar with the Bill of Complaint filed herein and the description of plant, equipment, facilities and the character of operations of the Company in the Forsyth-Rosebud district. These operations are substantially as set forth therein. The Forsyth-Rosebud district is treated as a sepa-
[fol. 30] rate operating and accounting unit of the corporation.

At said hearing before the said Commission I was a witness on behalf of the Company and presented certain exhibits showing a detailed statement by accounts of the Company's investment in electrical property in the Forsyth-Rosebud district.

My exhibits showed the investment in the various primary classifications of property, such as land, structures, boiler plant equipment, engines, electric plant, power plant equipment, sub-station equipment, poles, towers and fixtures, electric services, transformers, meters, street lighting equipment, office equipment, stores equipment, tools, transportation equipment, laboratory equipment and the cost of plants purchased.

As shown by my exhibits, which were offered and received in evidence and supported by oral testimony, the book cost of the Company's electrical property in the Forsyth-Rosebud district as of December 31, 1934, is the sum of Two Hundred Thirty Five Thousand Eight Hundred and Twenty Two Dollars and sixty-one cents ($235,822.61).

As further disclosed by said exhibits, the Company's investment in net additions to the plant in that district during the period from October 1, 1926, to December 31, 1934, amounted to the sum of Sixty Five Thousand Nine Hundred Thirty Five Dollars and nine cents ($65,935.09).

Exhibits and supporting testimony were also presented before said Commission at said hearing, showing the cost of reproduction new and the cost of reproduction new less accrued depreciation of the electrical property of the Company in that district as of December 31, 1934.

As disclosed by these exhibits and the said supporting testimony, the cost of reproduction new of said property as of said date was Two Hundred Thirty Five Thousand Seven Hundred Thirty-Seven Dollars ($235,737.00) and the cost of reproduction new less accrued depreciation was Two Hundred Six Thousand Eight Hundred Sixty Four Dol-
[fol. 31] lars ($206,864.00).

The book cost of property as above stated of $235,822.61 is the cost of fixed property only and does not include any allowance for working capital and material and supplies and only partial allowance for going concern value. The amounts shown above for reproduction cost new and reproduction cost less depreciation do contain an allowance for working capital, material and supplies and going concern value.

The Public Service Commission of Montana by its report and Order No. 1668 found the value of this same property in the Forsyth district to be not to exceed Ninety Thousand Dollars ($90,000.00).

In my opinion this valuation as fixed by the Commission is clearly inadequate, unfair, and unlawful, and will result, if applied by the Commission in the making of rates or otherwise, in the confiscation and taking of the Company's property.

Since the book cost of the Company's property, as indicated above, is $235,822.61, it will become necessary, if said valuation of $90,000.00 is sustained, to amortize out of the fixed capital account of the Company the difference between said amounts, or $145,822.61.

Assuming said amortization should be accomplished within a period of ten years, this will mean that the Company will have to write off and retire approximately $14,500.00 per year of its fixed capital.

On December 7, 1934, the Public Service Commission ordered the Mountain States Power Company to file rate schedules reducing the charges for residential and commercial service to be effective beginning January 1, 1935. In compliance with this Order, rate schedules were filed on December 18, 1934, and the annual earnings of the Mountain States Power Company after January 1, 1935, were thereby reduced by approximately Three Thousand Fifty Seven Dollars and twenty one cents ($3,057.21).

[fol. 32] Since the revenue from existing rates is insufficient to return to the Company the amount of the annual amortization and since the Commission has ordered a material reduction in the rates of the Company, if the Company is forced to accept said Commission's valuation and rate reduction, it will be forced to take a loss of approximately $11,969.68 per year for ten years.

Considering the reductions ordered by the Commission in Commission Order No. 1668 in the schedules of the Company, the average reduction in rates ordered is approximately 24.31 per cent.

Application of said reduced rates and charges will, on the basis of the 1934 business of the Company, reduce its annual gross electric revenue of $46,211.44 on existing rates to $34,977.84 under the reduced rates,—or an annual reduction of $11,233.60.

Under existing rates and on the basis of 1934 business, the net return to the Company in this district does not exceed 4.59 percent upon a rate base or valuation of $206,-864.00.

Under existing rates and on the basis of 1934 business, the net return to the Company in this district does not exceed 7.71 per cent upon a rate base or valuation of $155,-041.30.

Said valuation, or rate base as here used being the book value of the Company's electrical property in the district with the stand-by plant eliminated.

If the reduced rates as ordered by the Commission are applied to the cost of reproduction new less accrued depreciation, the Company will sustain a loss in revenue of $1,742.35 per year.

By the use of the term "loss" is meant that the Company will fail to earn anything for return by the amount shown, —in other words, this latter figure of $1,742.35 is a red figure.

Applying the reduced rates as ordered by the Commission to the book value, less the stand-by plant, the Company will receive for total return on its investment the sum of $720.91 per year.

[fol. 33] Giving effect to the reduced rates as ordered by the Commission and using the Commission's valuation of $90,000.00, the Company would be required to operate with annual net revenue of $2,530.32 per year in addition to the $14,500.00 per year lack of earnings with respect to the amortization of its property.

A summary of the elements of fair value which were shown before the Commission in its said proceedings, docket No. 1771, and which were patently ignored in arriving at its conclusion and fair value, are as follows:

(1) Book Cost of all Electric Property as of December 31, 1934, including Going Concern Value, Working Capital, Materials & Supplies	$250,833.57
(2) Book Cost of all Electric Property as of December 31, 1934, excluding Working Capital, Materials & Supplies and approximately 30 per cent of Going Concern Value	235,822.61
(3) Reproduction Cost New of all Electric Property as of December 31, 1934, including Going Value, Working Capital & Material & Supplies	235,737.00
(4) Reproduction Cost New Less Depreciation of all Electric Property as of December 31, 1934, including Going Value, Working Capital, Material & Supplies	206,864.00
(5) Book Cost of all Electric Property as of December 31, 1934, after eliminating the Steam Generating Plant, but including Going Value, Working Capital, Material & Supplies	155,041.30
(6) Total Full and True Value of all Electric Property as determined and used by the tax levying bodies in the State of Montana	139,738.00

Altho there was no substantial controverting evidence offered by any party to said hearing, the Commission concluded in its report and Order No. 1668 that the fair value of the Company's electrical property in this district "did not exceed" $90,000.00.

Under the requirements of the Commission's report and Order No. 1668, the reduction in rates ordered by it is made effective as of October 1, 1935.

Therefore, if the Company is required to accept the Commission's valuation of $90,000.00 and the reduced rates, [fol. 34] the Company will, beginning with October 1, 1935, sustain a daily actual operating loss of approximately $32.97 and will continue to sustain such loss daily for a period of at least ten years.

Applying the reduced rates as ordered by the Commission to the cost of reproduction new less accrued depreciа-

tion as hereinbefore referred to of $206,864.00, the Company will, beginning October 1, 1935, sustain a daily actual operating loss of $4.77 and will continue indefinitely thereafter to sustain such a daily loss.

The daily losses above referred to are exclusive of any allowance for return. In other words, if the reduced rates are applied as indicated the Company will fail to earn any return and will sustain an additional daily loss in the amounts shown.

John Ford.

Subscribed and sworn to before me, a Notary in and for the State of Oregon, residing at Albany, Oregon, this 28th day of September, 1935. B. E. Lee, Notary Public for Oregon. My commission expires Jan. 5, 1934. (Notarial Seal.)

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HOWARD F. LILL—Filed October 1, 1935

STATE OF MONTANA,
County of Cascade, ss:

Howard F. Lill, being first duly sworn on oath, deposes and says:

I make this Affidavit in support of the application of the Complainant Company for a preliminary restraining Order against the Report and Order No. 1668 of the Public Service Commission of Montana, more particularly referred to in the Bill of Complaint in the above entitled cause.

I graduated from the University of Indiana with a Degree in electrical engineering in the year 1917. I have followed and practised that profession continuously since my graduation. I have had in the neighborhood of fifteen years in valuation work. The first four years were mostly in the valuation of industrial properties and the next eleven or twelve years were spent in inventorying and valuing public utility properties, including electric, gas, water, steam heat, street railway and railroads. I have inventoried and appraised public utility properties in nearly every state in the Union and in Canada and Mexico and would say that

the reproduction cost of the properties so appraised by me in that time has been between $500,000,000.00 and $600,000,000.00. My qualification as a valuation and appraisal engineer were not questioned at the time of the hearing hereinafter referred to, in fact, they were admitted by the Attorney for the City of Forsyth.

I was personally present at the hearing before the Public Service Commission of Montana at Forsyth, Montana commencing on May 23rd, 1935, involving the valuation and rates of Mountain States Power Company in the Forsyth District. I am familiar with the Bill of Complaint filed herein and the description therein of plant, [fol. 36] equipment, facilities and the character and nature of operations of the company in that District are substantially as set forth in the Bill of Complaint. The Forsyth District is treated as, and is in fact, a separate operating unit of the company and is not physically connected with any other electrical property of the company.

At said hearing before the Commission I was a witness on behalf of the company and presented certain exhibits, including Exhibits 11 and 12 of the record before the Commission. Exhibit No. 11 submitted to the Commission, was a detailed inventory and appraisal of the company's electrical property located and operated in the Forsyth District. This inventory and appraisal were prepared by me in detail and with considerable care and in my opinion correctly record the list of items of property therein referred to and correctly reflect the unit prices and the totals shown therein.

In my opinion the reproduction cost new as of December 31, 1934 of the company's electrical property in the Forsyth District was $235,737.00, including working capital, material and supplies and going concern value. As shown by my inventory and appraisal the value of the physical property was as of said date $207,471.00.

Exhibit No. 12 offered and received in evidence in the said proceeding before the Commission was a study and tabulation showing the cost of reproduction new less accrued depreciation of the company's electrical property in the Forsyth District. In my opinion the amount shown therein for this element of value, $206,864.00, is a fair and correct statement of such value. The depreciated condition of the property was determined by me by an inspection in

the field of the various units of property. The reproduction cost new less accrued depreciation of the physical property alone as shown in my said report was $178,598.00.

[fol. 37] My said exhibits and supporting and explanatory testimony were the only exhibits and testimony offered and received in evidence in the proceeding before the Commission containing a complete study of the elements reproduction cost new and reproduction cost new less accrued depreciation for the entire property. No comparable similar studies were presented by any party or person.

Reference is made in the Commission's Report and Order No. 1668 to the steam generating plant of the company at Forsyth, Montana, and contention was made at the time of the hearing particularly by the Attorney for the City of Forsyth that said steam plant should be eliminated from the valuation. If said steam plant were eliminated from consideration in determining the value of this property, the amount heretofore stated with respect to reproduction cost new and reproduction cost new less accrued depreciation would be reduced. With the steam plant eliminated the cost of reproduction new as of December 31, 1934, would be $159,505.00 and the cost of reproduction new less accrued depreciation would be $146,861.00.

Howard F. Lill.

Subscribed and sworn to before me this 30th day of September, 1935. E. G. Toomey, Notary Public for the State of Montana Residing at Helena, Montana. My commission expires May 1, 1938. (Notarial Seal.)

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER—Filed Oct. 8, 1935

Whereas, it appears to the Court from the duly verified Bill of Complaint, the Exhibits attached thereto and the Affidavits filed in support thereof, in the above entitled Court and in the above entitled cause, that the Public Serv-

ice Commission of Montana has issued and rendered a Report and Order Numbered 1668—Docket No. 1771, entitled: "In Re: Rates Charged by the Mountain States Power Company, Forsyth, Montana" wherein said Public Service Commission of Montana has promulgated and ordered enforced certain schedules of rates and charges for electric service in Forsyth and Rosebud, Montana, commonly referred to (with other communities) as the Forsyth District, effective October 1st, 1935; and,

It appears that if the complainant, the Mountain States Power Company, is required to sell and distribute electric energy under and in accordance with said Report and Order, said Complainant will be required to operate at a loss and will each day sustain and suffer substantial, irreparable and continuing loss and damage, as is more fully set forth in the Bill of Complaint filed in the above entitled cause, and in said Affidavits, to which reference is hereby made for greater particulars; and

It appears from the said Bill of Complaint, Exhibits attached thereto and Affidavits filed in support thereof, that the requirements, terms and provisions of said Report and Order are unlawful, unjust and confiscatory; and

It appears that there is danger that substantial, irreparable loss and damage would result to the Complainant herein before a hearing on the said application for interlocutory injunction, and that the imminent application of [fol. 39] the rate reductions ordered by the defendant, Public Service Commission of Montana, in said Report and Order is prima facie immediately and daily confiscating the property of the complainant herein, and that the rights of the defendants and all others interested or directly affected by said Report and Order, including the customers of said Complainant at Forsyth and Rosebud, Montana, can be fully protected by requiring Complainant to impound the amounts collected by it from each of its customers under existing schedules at Forsyth and Rosebud, Montana in excess of the rates prescribed or allowed by the said Defendant Commission in its said Report and Order No. 1668, and that in the event the rates prescribed by said Defendant Commission in said Report and Order should be adjudged to be valid, the excess over said prescribed rates collected by the Complainant shall be returned to the said customers from whom collected, and that the power of this

Court should be used to accord prompt relief in the premises; and

It appears that if this Court does not immediately and forthwith issue a temporary restraining order, preliminary to a hearing before this Court, in the above entitled cause, a multiplicity of suits and actions will result, as is more fully set forth in the Bill of Complaint on file herein, to which reference is made for greater particulars; and

It appears that this Complainant has no plain, speedy and efficient remedy at law or in equity in the Courts of the State of Montana; and

It appears from the duly verified Bill of Complaint, the Exhibits attached thereto and the Affidavits filed in support thereof, in the above entitled Court and in the above entitled cause, that a temporary restraining order, preliminary to a hearing, is proper, justified and required to prevent such substantial, irreparable loss and injury and damage and to prevent a multiplicity of suits and actions, and that the power of this Court should be exercised by the [fol. 40] issuance and granting of such restraining order;

It is Ordered that the Defendants and each of them appear before the above entitled Court in the courtroom of said Court in the Federal Building in the City of Missoula on the 8th day of October, 1935, at the hour of 10:00 o'clock A. M., and then and there show cause, if any they have, why an interlocutory injunction should not issue and continue in force until such final hearing on the said Bill of Complaint; and

It is Further Ordered that Complainant's application and prayer for a temporary restraining order shall be, and it is hereby granted, and the defendants, and each of them, and all persons acting in aid or assistance of said defendants, or their successors in office, be, and are hereby, restrained and enjoined from: (a) enforcing, or attempting to enforce by mandamus, by action at law, by suit in equity, by criminal proceedings, by suit to enforce penalties, or in any other manner the said Report and Order No. 1668, of the defendant Commission or any part of said Report and Order, or the schedules of rates and charges promulgated and proposed to be put into effect by the Commission in said Report and Order No. 1668, or each or any of such schedules, rates or charges; (b) from in any way restraining, interfering with or preventing the com-

pany from applying and collecting the rates, charges, classifications, rules, and regulations contained in the company's existing tariffs on file with said Commission and applicable to said towns of Forsyth and Rosebud in said Forsyth District in Montana.

It is Further Ordered that said Complainant shall monthly deposit with the Clerk of this court any and all sums of money by it collected from its customers at Forsyth and Rosebud, Montana in excess of the rates and charges prescribed by the said defendant Commission, in its said Report and Order No. 1668 from and after October 1st, 1935, until the further order of this Court, said sums so impounded to be by the Court ordered refunded to the cus-
[fol. 41] tomers from whom collected, pending the operation of this order or any further order of impoundment herein, in the event that the said Report and Order shall be finally adjudged valid; and

It is Further Ordered that this temporary restraining order shall be effective upon the filing with the Clerk of the above entitled Court of a bond conditioned in conformity with this order, in the sum of Fifteen Thousand ($15,000.00) Dollars.

It is Further Ordered that a copy of this order, certified under the hand of the Clerk and the Seal of the above entitled Court, be served on each of the defendants to be restrained thereby and upon the Governor of the State of Montana and upon the Attorney General of the State of Montana, at least five (5) days before the date fixed for said hearing;

Dated this 1st day of October, 1935.

Charles N. Pray, United States District Court Judge.

Attest: C. R. Garlow, Clerk, by C. G. Kegel, Deputy. (Seal.)

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Montana, ss:

I hereby certify and return that I served the annexed Order to Show Cause and Temporary Restraining Order on the thereinnamed F. H. Cooney as Governor of the State of Montana and on Raymond T. Nagle, as Attorney General for the State of Montana by handing to and leaving a

true and correct copy thereof with each of them personally at Helena, Montana in said District on the 2nd day of October, A. D. 1935.

Sid A. Willis, U. S. Marshal, by J. P. Johnsrud, Deputy.

[fol. 42] Return on Service of Writ

UNITED STATES OF AMERICA,
District of Montana, ss:

I hereby certify and return that I served the annexed Order to Show Cause and Temporary Restraining Order on the thereinnamed City of Forsyth, Montana, by handing to and leaving a true and correct copy thereof with L. B. Paine, Mayor of said City of Forsyth, Montana personally at Forsyth in said District on the 3rd day of October, A. D. 1935.

Sid A. Willis, U. S. Marshal, by E. Lieberg, Deputy.

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Montana, ss:

I hereby certify and return that I served the annexed Order to Show Cause and Temporary Restraining Order on the thereinnamed F. F. Haynes, as County Attorney of Rosebud County, Montana, by handing to and leaving a true and correct copy thereof with him personally at Forsyth in said District on the 3rd day of October, A. D. 1935.

Sid A. Willis, U. S. Marshal, by E. Lieberg, Deputy.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO QUASH ORDER TO SHOW CAUSE—Filed October 8, 1935

Come now the defendants in the above-entitled action and move the Court to dissolve the Temporary Restraining Order and to Quash the Order to Show Cause entered herein on the 1st day of October, 1935, on the following grounds and for the following reasons, to-wit:

I

That as appears upon the face of the Bill of Complaint and upon the affidavits in support of the Temporary Restraining Order, this Court is without jurisdiction to entertain the action or to make any order therein because it is prohibited from so doing by the Act of Congress of May 14, 1934. (Ch. 283, Sec. 1, 48 St. at large, 775.)

II

That the Bill of Complaint does not state facts sufficient to constitute a cause of action in this Court for equitable or any relief.

Raymond T. Nagle, Attorney General of the State of Montana. A. H. Angstman, Counsel, Public Service Commission of Montana; F. F. Haynes, County Attorney, Rosebud County, Montana, Attorneys for Defendants.

Service of the foregoing Motion to Dissodve the Temporary Restraining Order and to quash the Order to Show Cause this 8th day of October, 1935, admitted.

E. G. Toomey, Hance H. Cleland, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 44] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed October 8, 1935

Come now the defendants in the above-entitled action and move the Court to dismiss the above-entitled action and to dismiss the complaint filed therein on the following grounds and for the following reasons, to-wit:

I

That as appears upon the face of the Bill of Complaint this Court is without jurisdiction to entertain the action or to make any order therein because it is prohibited from so doing by the Act of Congress of May 14, 1934. (Ch. 283, Sec. 1, 48 St. at large, 775.)

II

That the Bill of Complaint does not state facts sufficient to constitute a cause of action in this Court.

Raymond T. Nagle, Attorney General of the State of Montana. A. H. Angstman, Counsel, Public Service Commission of Montana; F. F. Haynes, County Attorney, Rosebud County, Montana, Attorneys for Defendants.

Service of the foregoing Motion to Dismiss admitted this 8th day of October, 1935.

E. G. Toomey, Hance H. Cleland, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 45] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF HEARING

No. 1522, Montana Power Company vs. Public Service Commission of Montana, et al.

No. 3003, Mountain States Power Company vs. Public Service Commission of Montana, et al.

No. 3004, Mountain States Power Company vs. Public Service Commission of Montana, et al.

These three causes came on regularly for hearing this day before the court of three Judges, consisting of Honorable Bert E. Haney, United States Circuit Judge, and Honorable Charles N. Pray and Honorable James H. Baldwin, United States District Judges.

Case No. 1522, Montana Power Company vs. Commission, et al., was duly called for hearing on the motion and application of complainant for an interlocutory injunction, duly filed, and on defendants' motion to dismiss the complaint, this day filed herein.

Mr. William L. Murphy, Mr. J. T. Finlen, Jr., and Mr. J. E. Corette, Jr., appeared for the complainant and Mr. A. H. Angstman appeared for the defendants. Mr. Albert Besancon appeared as amicus curiæ in behalf of the water users of Missoula County.

Case No. 3003, Mountain States Power Company vs. Commission, et al., was duly called for hearing on the order to show cause why an interlocutory injunction should not issue herein, and on the defendants' motions, this day filed, to dismiss the complaint and to dissolve the temporary restraining order herein. Mr. E. G. Toomey and Mr. H. H. Cleland appeared for the complainants and Mr. A. H. Angstman and Mr. Al Hansen appeared for the defendants.

Case No. 3004, Mountain States Power Company vs. Commission, et al., was duly called for hearing on the order to show cause why an interlocutory injunction should not issue herein, and on the defendants' motions, this day filed, [fol. 46] to dismiss the complaint and to dissolve the temporary restraining order herein. Mr. E. G. Toomey and Mr. H. H. Cleland appeared for the complainant, and Mr. A. H. Angstman and Mr. F. F. Haynes appeared for the defendants.

Mr. Walter T. Bleick and Mr. Jos. Flaherty acted as court reporters.

Thereupon, on motion of its counsel, the complainant in case No. 1522, Montana Power Company vs. Commission, et al., was granted leave to amend its complaint, by interlineation, as follows: on page 20, line 15, change the figures $148,332.57 to $101,204.00, and on page 20, line 30, change the figures $1,287,792.00 to $1,278,792.00.

Thereupon counsel for complainant in said cause filed and presented to the court an affidavit in triplicate, correcting certain figures in the affidavits of F. M. Kerr and J. R. Thomas heretofore filed therein; and in said cause counsel asked that the record show that the complainant now presses, reiterates and renews its motion and application for interlocutory injunction.

Thereupon, by agreement of all parties, expressed in open court, and it appearing that the same or like questions are involved in all three of said causes, court directed that they be heard and presented together at this time.

Thereupon said causes were duly heard, argued and submitted, and by the court taken under advisement, each side being granted twenty days in which to prepare, serve and file written arguments and briefs, such time to run concurrently.

At tne close of his argument, Mr. Angstman, counsel for the defendants, asked that said defendants, in the event

it becomes necessary, be granted ten days after final decision in which to answer, and it was so ordered.

Mr. Besancon, for the water users, requested that, in the event the court retains jurisdiction, he be allowed to intervene and file an answer in case No. 1522, Montana Power [fol. 47] Company vs. Commission, et al., when heard upon the merits.

Entered in open court at Missoula, Montana, October 8, 1935.

C. R. Garlow, Clerk.

[fol. 48] IN UNITED STATES DISTRICT COURT

Before Haney, Circuit Judge, and Baldwin and Pray, District Judges

MEMO DECISION—Filed February 3, 1936

PRAY, District Judge:

The foregoing suits in equity were brought to enjoin the enforcement of orders issued by the Public Service Commission of Montana, reducing the rates and charges fixed by complainants on the sale and distribution of natural gas, water and electricity on the ground that such reduction amounts to a taking of their property without due process of law, in violation of the federal constitution. Temporary restraining orders and orders to show cause why interlocutory injunctions should not be granted, were issued.

The question at this time for our consideration arises on the motions to dismiss in all three cases for lack of jurisdiction. These motions were heard by the said Court at Missoula, on October 8th, 1935. Oral arguments were made and briefs submitted by counsel for the respective parties. Subsequent to the hearing and before the Court had passed upon the motions to dismiss, the complainant Montana Power Company and the defendant Public Service Commission came to an agreement as to the rates and charges to be adopted and entered into a stipulation for the dismissal of this case and submitted a form of order to carry it into effect, which has been approved and signed by all of the Judges of said Court. The other two cases are still

pending on the motions to dismiss. The legal questions involved in these motions are like those before a three Judge Court convened at Helena June 5th, 1935, wherein three Public Utility Companies brought suits against the Public Service Commission of Montana, seeking the same injunctive relief as in the instant cases, and upon the same [fol. 49] grounds, and were met with like motions to dismiss for lack of jurisdiction. An opinion in the aforesaid cases of June 5th, 1935, was filed in said Court on Nov. 20th, 1935, in which all three Judges concurred. We have considered that opinion in connection with the arguments and briefs of counsel in the present cases and agree in the main with the text and reasoning therein, and the authorities relied upon to support it. (Montana Power Co. vs. Public Service Com., No. 1506, Butte Water Co. v. Public Service Com., No. 1513, Fred A. Horning v. Public Service Com., No. 1514.)

Wherefore, having fully considered the questions in issue, and being duly advised, and good cause appearing therefore, the motions of the defendants to dismiss the two remaining suits for lack of jurisdiction are hereby granted.

All concur.

[File endorsement omitted.]

[fol. 50] OPINION BY THREE-JUDGE COURT

The Opinion of November 20, 1935, by three-Judge Court, referred to and adopted in the Memo Decision next preceding, is the opinion in Montana Power Co. v. Public Service Commission of Montana, et al, now reported in 12 Federal Supplement, 946.

[fol. 51] IN UNITED STATES DISTRICT COURT

APPLICATION FOR STAY PENDING APPEAL—Filed February 5, 1936

To the Honorable the Judges of the Above-entitled Court in the Above-entitled Cause:

Complainant hereby advises that it intends to appeal to the Supreme Court of the United States from the decree to be entered in this cause, in accordance with the decision

herein, and hereby makes application for an order continuing the restraining order heretofore issued in said cause in force for a reasonable time, not exceeding thirty (30) days after the entry of said decree, within which to take and perfect said appeal, and further continuing said restraining order in force after said appeal is taken pending the hearing and decision of said case on said appeal by the Supreme Court of the United States, and that the decree to be entered herein provide accordingly; conditioned, if the court require, upon continuation of the impoundment heretofore ordered, established and in operation herein and continuance of the bond in the sum of Fifteen Thousand ($15,000.00) Dollars heretofore filed herein and supporting said impoundment "during the pendency of said temporary restraining order and the further order of the court in the above entitled cause", as in said bond recited, or such additional or other bond conditioned in such terms and in such sum as the court may order herein.

Complainant, by its solicitors, in support of said application, hereby represents and states that, unless said application is granted and said restraining order continued in force, the complainant will suffer irreparable injury as appears from the complaint in said cause on file herein.

[fol. 52] Respectfully submitted, Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington. E. G. Toomey, John W. Chapman, of Helena, Montana, Solicitors and Attorneys for Complainant.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF HEARING

No. 3003, Mountain States Power Company vs. Public Service Com., et al.

No. 3004, Mountain States Power Company vs. Public Service Com., et al.

The above entitled causes came on regularly for hearing this day on application of plaintiff for stay pending appeal, Mr. E. G. Toomey and Mr. Hance H. Cleland appearing for

the Plaintiff in each case, and Mr. F. F. Haynes appearing for the defendants.

Thereupon Mr. John Ford was sworn and testified for plaintiff, and the court after hearing the arguments of counsel for each side, ordered the matter submitted, each side being granted ten days for briefs.

Entered in open court at Great Falls, Montana, March 6th, 1936.

[fol. 54] IN UNITED STATES DISTRICT COURT

ORDER DISSOLVING INJUNCTION AND DENYING MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL—Filed April 9, 1936

This court has heard and considered the application for a stay order pending appeal in the above entitled causes, and likewise the evidence and briefs submitted. We have heretofore concurred in an opinion filed herein that this court is wholly without jurisdiction and have ordered the dismissal of said causes for that reason, and have endeavored to point the way to a plain, speedy and efficient remedy in the State Courts. No effort has been made on the part of complainants to avail themselves of the remedy proposed by this court that has come to our attention. If the court were now to grant the stay requested the operation of the decree of dismissal would be postponed for a year or more, and to that extent would be of no avail and would result in continuing the injunctive relief which we have heretofore denied for the reason that this court was without jurisdiction to grant it in the first instance. The practical effect would be to nullify the decree of dismissal for lack of jurisdiction. The court does not consider the grounds alleged of such pressing importance as to warrant the continuance of the injunction, and, accordingly, good cause appearing therefor, the injunction aforesaid is hereby dissolved and the motion for a stay of proceedings pending appeal is denied.

Bert E. Haney, Charles N. Pray, James H. Baldwin, Judges.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT

DECREE—Filed April 9, 1936

This cause came on to be heard on the 8th day of October, 1935, and was argued by counsel for the respective parties and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that the motion of the defendants to dismiss for lack of jurisdiction should be granted.

Wherefore, it is ordered, adjudged and decreed that the said action and the Bill of Complaint therein filed be, and the same hereby are dismissed and that defendants have judgment for their costs herein incurred in the sum of — Dollars.

Dated this 9th day of April, 1936.

Bert E. Haney, Charles N. Pray, James H. Baldwin, Judges.

[File endorsement omitted.]

[fol. 56] IN UNITED STATES DISTRICT COURT

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed April 17, 1936

To the Honorable the Statutory Three-Judge Court Herein, and to the Honorable Judges Thereof:

Considering itself aggrieved by the final Decree of Dismissal rendered and entered in the above entitled cause on the 9th day of April, 1936, by the statutory court of three Judges convened herein, Mountain States Power Company, a corporation, complainant herein, hereby does appeal from said decree to the Supreme Court of the United States and prays that an order allowing appeal be entered herein and for an order fixing the amount of the bond thereon, and that citation be issued as provided by law and that a transcript of the record, proceedings, testimony and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, Washington, D. C., under the rules of said court in such cases made and provided.

Assignment of Errors

And the said Mountain States Power Company, complainant, assigns errors and abuses of discretion by said court in the record and proceedings in said cause as follows:

1. In refusing to grant an interlocutory injunction where the admitted allegations of the bill of complaint and the undisputed affidavits filed therewith clearly disclosed substantial, daily and continuing confiscation of complainant's property and that the damage complainant will suffer, if the Commission order is permitted to become presently effective, will be irreparable.

2. In holding in its decision that the State of Montana affords "a plain, speedy and efficient remedy at law or in [fol. 57] equity" in its court within the meaning of the Johnson Act (Act of Congress of May 14, 1934; Judicial Code Section 24, 28 U. S. C. A. Section 41, Chapter 283, Section 1, 48 Stat. 775).

3. In holding that the Johnson Act divested the District Court of its jurisdiction in a confiscation case where the state statute denies stay or supersedeas pending final determination.

4. In sustaining the motion to dismiss for alleged lack of jurisdiction.

5. In refusing to issue the interlocutory injunction as prayed for.

6. In denying complainant a stay pending appeal to the Supreme Court of the United States.

7. In placing complainant to the hazard of severe and drastic penalties for failure to comply with said Commission order and submit to the confiscation of its property.

8. In failing to grant a stay pending appeal to the Supreme Court of the United States, requiring complainant to impound the difference between the existing and the reduced rates, and to furnish a bond for the faithful compliance with such impoundment as has been done under the requirements of the preliminary restraining order.

Prayer for Reversal

For which errors and abuses of discretion, the complainant prays that the said decree of the three-Judge statutory

court dated April 9th, 1936, be reversed and a judgment ordered in favor of complainant directing said court to entertain jurisdiction of said cause on application for interlocutory injunction on the merits, and for costs.

Done and dated April 17, 1936.

[fol. 58] Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington. E. G. Toomey, John W. Chapman, of Helena, Montana.

Service of the foregoing Petition for Order of Appeal, Assignment of Errors and Prayer for Reversal and receipt of a true copy of each thereof on April 18th, 1936, is hereby acknowledged this 18th day of April, 1936.

Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; F. F. Haynes, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 59] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed April 17, 1936

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the final Decree of Dismissal made and entered on the 9th day of April, 1936 in the above entitled suit by the three-Judge statutory court convened herein, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors and Prayer for Reversal, and, separately, Statement Particularly Disclosing the Basis of Appellate Jurisdiction in the Supreme Court of the United States to review the decree in question, pursuant to the statutes, and the rules of the Supreme Court of the United States, in such cases made and provided and it appearing that there was drawn in question the validity of a formal written order of the Public Service Commission of the State of Montana, purporting to fix the value of complainant's electric system in the Forsyth, Montana, district, and ordering reductions in the company's rates for electric service, and preliminarily the question of whether the State of Mon-

tana affords complainant a plain, speedy and efficient remedy in its courts, within the meaning of the Johnson Act, (Act of Congress, May 14, 1934; 48 Stat. 775; Chapter 283,-28 U. S. C. A., Section 41, (1) in the presence of Section 3906, Revised Codes, Montana, 1921) and that such petition is a proper petition for the issuance of an order allowing appeal:

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the final Decree of Dismissal of the three-Judge statutory court specially convened in the United [fol. 60] States District Court for the District of Montana in this cause, as provided by law.

It is further ordered that the Clerk of the Court appealed from shall prepare and certify a transcript of the record, testimony, proceedings, decree, stipulations, etc. in this cause and transmit the same to the Supreme Court of the United States as required by law and the rules of said court.

It is further ordered that the appellant, Mountain States Power Company, execute to the respondents, its bond with surety to be approved by the undersigned in the sum of one thousand dollars ($1,000) Dollars as security for costs on appeal and to be conditioned according to law

Done and dated this 17th day of April, 1936.

Charles N. Pray, Judges.

[File endorsement omitted.]

[fols. 61-63] Bond on appeal for $1,000.00 approved and filed April 17, 1936, omitted in printing.

[fols. 64-67] Citation, in usual form, showing service on Raymond T. Nagle et al., filed April 18, 1936, omitted in printing.

[fol. 68] IN UNITED STATES DISTRICT COURT

Statement of Evidence on Application for Stay—Filed April 25, 1936

Be it Remembered, that the application by complainant for stay of entry of decree, and for stay after entry of

decree pending appeal to and in the Supreme Court of the United States by complainant from the decree of dismissal entered herein, came on regularly for hearing on the 6th day of March, 1936, Honorable Charles N. Pray, one of the Judges of the three-Judge court herein, presiding, Hance H. Cleland of Olympia, Washington, and E. G. Toomey of Helena, Montana, appearing as counsel for complainant, and F. F. Haynes, of Forsyth, Montana, appearing as counsel for defendants, and thereupon the following proceedings were had and done, and the following evidence received:

COLLOQUY

The Court: Are you ready to proceed in this matter, gentlemen?

Mr. Toomey: We are, Your Honor, at this time. The decision, as your Honor knows came down February 3rd, and on February 5th the Complainant filed application for a stay, and your Honor subsequently notified us that the application was referred to the other members of the special Court.

This morning has been set for taking proof and any argument which the Court might desire in connection with the application.

The Court: This is the application for a stay.

Mr. Toomey: Yes, your Honor.

The Court: On your application showing any reasons you may have which you think are sufficient to entitle you to a stay. Have you any officer or some person who can tell the circumstances? I would——

Mr. Toomey: Yes, I would like to have those witnesses offer testimony through Mr. Cleland whom I heretofore presented to the Court as counsel in this case.

[fol. 69] The Court: Judge Haney, one of the members of the Court will be here on a three Judge Court next week, Tuesday or Wednesday, and a few days ago he mentioned this matter. He said, I wish you could dispose of it while I am up there; as long as we are involved in this hearing I did not like to postpone this and make you come again; it would make it very inconvenient. I thought perhaps you might take the testimony this morning and have it transcribed and then when Judge Haney comes we can consult together about it. You may proceed, gentlemen:

JOHN FORD, a witness called and sworn on behalf of complainant, testified as follows:

My name is John Ford; I am Assistant Secretary of the Mountain States Power Company, the complainant in this case. I was a witness in the hearings before the Public Service Commission in both the Baker and Forsyth cases. I am familiar with the books of record and accounts of the Mountain States Power Company, and with the Commission's orders as to valuations and rates in the Baker case and in the Forsyth case. The Forsyth system is located in Rosebud and Custer Counties, Montana, and serves the towns of Rosebud and Forsyth and the contiguous territory. This system is also separate from the rest of the company property and separate records and accounts are maintained for this system. The books, records and accounts of the company are kept in accordance with the official classification of accounts, as prescribed by the Public Service Commission of Montana, and this is true, both with respect to Baker and to Forsyth.

I am referring now to the Forsyth case. There was presented before the Commission the book cost as of December 31, 1934, including going valuation, working capital, and materials and supplies, amounting to $251,833.00. Also the book cost excluding working capital, materials and supplies, and approximately thirty per cent of the going valuation, $235,822.00. On the book cost, eliminating [fol. 70] the steam plant, but including working capital, going valuation, materials and supplies, $155,041.00. The reproduction cost, new, based on a detailed inventory and appraisement, including going valuation, working capital, materials and supplies, $235,737.00. Reproduction cost less depreciation including going valuation, working capital, materials and supplies, $206,864.00. The city engineer of the City of Forsyth introduced a total plant cost as of December 31, 1934, excluding the steam plant, totaling $129,887.00. There was also introduced by the City Engineer of Forsyth the total plant cost, but less depreciation, amounting to $93,688.00. The assessed valuation for tax purposes for the year 1934 was $139,738.20. The Commission's Order issued as to valuation, is in an amount "not to exceed $90,000.00". There was no other opposing testimony regarding valuation.

If the existing, or old rates, as we call them had been in effect throughout the year 1935, the gross revenue for the Forsyth district would be $50,284.00. The operating expenses for the year 1935, including taxes and depreciation expense as prescribed by the classification amounted to $39,048. This would result in a net income of $11,236.00 for the year 1935. This would leave a rate of return under the old or existing rate on reproduction cost less depreciation, as of December 31, 1934, of 5.04%. These figures are on the assumption that the old or existing rates had remained in effect throughout the entire year 1935.

Had the reduced rates been in effect throughout the year 1935; the gross revenue under such reduced rates would have amounted to $41,208.00, or a reduction in gross revenue as against the revenue from the old rates of $9,076.00. This is a percentage reduction of 18.05%. Deducting the operating expenses of $39.048, that would leave a net income under the reduced rates of $2,160.00, or a rate of return on reproduction cost less depreciation, as of December 31, 1934 of 1.04%, slightly more than one per cent. If I [fol. 71] used the assessed valuation for taxing purposes as the base, the rate of return would be 2.55% or approximately 2½%.

There are six hundred forty three customers of all classes in the Forsyth district. I have computed the average difference in their bills under the old and new rate. That average difference would amount to $14.11 per customer per year, including power and other large users. The average difference in customers bills per month would be $1.18.

The reduction in revenue to the company by reason of the reduced rates is $9,076.00 per year or $756.00 per month, or $24.87 per day. In other words, that is the amount of difference between the old and new rate which would be taken from the company if the new rates were to be put into effect immediately. The existing rates went into effect after a hearing before the Commission and a formal order as of January 1, 1935.

There has been impounded in this court for the Forsyth district, since the suit was instituted, and up to this time, the amount of $2,890.96.

If the company is denied a stay in this case, it would, in order to comply with the decree, have to refund this amount, of $2,890.96, and forego $756.00 per month or $24.87 per

day from now on. In addition to this loss of earnings, the company would have to amortize $14,500 per year for ten years, in order to charge off the books the difference between the Commission's valuation and the book valuation. I say ten years because that is the average length of time in which property is amortized. Refund, in the event a stay was denied, would have to be made to 643 different customers in comparatively small amounts. Assuming that the company was successful in its appeal, it would not be possible or practical for the company to recover refunds from these customers, for various reasons; one, people are constantly moving away out of the system. Two, there would be such a multiplicity of suits for such small amounts [fol. 72] that it would be impractical. Three, public relations would be entirely destroyed. Four, the expense of approximately 643 suits for small amounts would be prohibitive, and the company, indeed, as a whole, would, in my opinion, be insane to even attempt such a procedure as to attempt to recover the small amounts from approximately six hundred forty three customers. It would be suicidal for the company to undertake to recover the considerably small amounts from such a large number of customers in the district.

Mr. Cleland: I think, your Honor, we have covered the situation as we see it.

Mr. Haynes: No cross examination.

The Court: I see your point. You better make an argument, and have it taken down for the record.

Wherefore, complainant and appellant prays that the above statement of evidence be settled, approved and allowed by the above entitled court as a true, full and complete statement of all evidence taken and given on the application for stay, for use on complainant's appeal to the Supreme Court of the United States.

Done and dated this 18 day of April, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington; E. G. Toomey, John W. Chapman, of Helena, Montana, Counsel for Appellants.

Lodge with Clerk Apl- 20, 1936.

[File endorsement omitted.]

[fol. 73] IN UNITED STATES DISTRICT COURT

STIPULATION APPROVING STATEMENT OF EVIDENCE—Filed April 22, 1936

It is hereby stipulated and agreed, by and between the undersigned, Solicitors and Attorneys of record for complainant and appellant, and the undersigned, Solicitors and Attorneys of record for defendants and appellees, that the proposed statement of evidence on application for stay, lodged with the clerk of the above entitled court on April 20th, 1936, by the complainant, is agreed to as a correct statement under paragraph B of equity rule 75, and, further, that the said statement may be approved by the above entitled court, or a Judge thereof, without further notice.

Done and dated this 21st day of April, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington; E. G. Toomey, John W. Chapman, of Helena, Montana, Solicitors and Attorneys for Complainant. Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; F. F. Haynes, Solicitors and Attorneys for Defendants.

[File endorsement omitted.]

[fol. 74] IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE—Filed April 25, 1936

On this 25th day of April, 1936, came on for consideration the matter of the approval of the Statement of Evidence lodged herein by complainant and appellant on April 20th, 1936, and it appearing to the Court that the ten days' notice of the Lodgment and of the hearing on complainant's application for Approval of said Statement has been given to defendants and their counsel as required by Equity Rule Seventy-Five (75); and it further appearing that the parties have heretofore filed herein their written stipulation agreeing that said Statement of Evidence is a correct Statement under said rule and may be approved without further notice;

It is ordered by the Court that the said statement of evidence on application for stay be, and the same is hereby approved as part of the record herein, for the purpose of complainant's appeal to the Supreme Court of the United States.

April 25, 1936.

Charles N. Pray, Judge.

[File endorsement omitted.]

[fol. 75] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING PARTY DEFENDANT—Filed April 23, 1936

Upon the stipulation of the parties and the facts requiring:

It is ordered: That Elmer Holt, as Governor of the State of Montana, be substituted as a party defendant herein, in lieu of F. H. Cooney, as Governor of the State of Montana, deceased since commencement of this suit.

Done and dated April 23rd, 1936.

Charles N. Pray, United States District Judge.

[File endorsement omitted.]

[fol. 76] IN UNITED STATES DISTRICT COURT

STIPULATION FOR CONTENTS OF TRANSCRIPT OF RECORD ON APPEAL—Filed April 22, 1936

It is hereby stipulated and agreed by and between the undersigned attorneys of record for plaintiff and appellant and defendants and appellees, respectively, that the papers on record which shall constitute the Transcript of Record on Appeal to the Supreme Court of the United States herein shall consist of the following:

1. Bill of Complaint and all Exhibits thereto attached.
2. Affidavits of John Ford and Howard F. Lill.
3. Order to Show Cause and Temporary Restraining Order.
4. Motion to Dissolve Temporary Restraining Order.
5. Motion to Dismiss Bill of Complaint.

6. Minute Entry on Motion for Interlocutory Injunction and Submission of Case on such Motion.

7. Memo Decision by Three-Judge Court on Feb. 3, 1936.

8. Opinion by Three-Judge Court on November 20, 1935 by reference to citation in 12 Fed. Supp. 946.

9. Application for Stay Pending Appeal.

10. Statement of Evidence and Stipulation and Order Thereon.

11. Minute Entry of March 6, 1936, on Submission of Stay Application.

12. Order Denying Application for Stay and Dissolving Temporary Restraining Order.

13. Decree of Dismissal.

14. Petition for Appeal, Assignment of Errors and Prayer for Reversal.

15. Statement of Basis of Appellate Jurisdiction (separately certified).

16. Order Allowing Appeal.

17. Copy of Bond on Appeal.

[fol. 77] 18. Citation on Appeal and Service thereon.

19. Statement by appellees under Paragraph 3 of Rule 12 of United States Supreme Court Rules and service thereof.

20. This stipulation.

And the Clerk of the above-entitled court is requested to forward to the Clerk of the Supreme Court of the United States, at Washington, D. C. a transcript containing only the papers designated herein.

This Stipulation is made and entered into pursuant to Rule 10 and Paragraph 9 of Rule 13 of the rules of the Supreme Court of the United States.

Dated this 21st day of April, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington; E. G. Toomey, John W. Chapman, of Helena, Montana, Attorneys for Appellant. Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; F. F. Haynes, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 78] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 79] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed April 28, 1936

Comes now the appellant and adopts its Assignments of Error and Specification of Abuses of Discretion as its Statement of the Points to be Relied Upon, and states that the whole of the record, as transmitted and filed, is necessary for the consideration of the case.

Done and dated at Helena, Montana, April 25th, 1936.

Hance H. Cleland, Raymond W. Clifford, of Olympia, Washington; E. G. Toomey, John W. Chapman, of Helena, Montana, Attorneys for Appellants.

[fol. 80] Service of the above and foregoing statement is hereby admitted and receipt of a true copy thereof acknowledged this 25th day of April, 1936. Appellees consent to hearing on record as made and designated above.

Raymond T. Nagle, Attorney General of Montana; Albert H. Angstman, Counsel, Public Service Commission of Montana; F. F. Haynes, Attorneys for Appellees.

[fol. 81] [File endorsement omitted.]

Endorsed on cover: File No. 40,511. Montana D. C. U. S. Term No. 39. Mountain States Power Company, appellant vs. Public Service Commission of Montana et al. Filed April 23, 1936. Term No. 39, O. T. 1936.

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IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF MONTANA

IN EQUITY.

No. 3004

MOUNTAIN STATES POWER COMPANY, A CORPORATION,

Complainant,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA ET AL. AND THE CITY OF FORSYTH, MONTANA, A MUNICIPAL CORORATION,

Defendants.

STATEMENT OF JURISDICTION UNDER AMENDED RULE 12.

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, as amended by Order of May 31, 1932, the above named complainant and appellant files this its separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the Decree of Dismissal appealed from herein, as follows:

(a)

The statutory provisions believed to sustain the appellate jurisdiction are Sections 238 and 266 of the Judicial

Code as amended (28 U. S. C. A., Sec. 345 (3) and Sec 380).

(b)

The Statute (Order) of the State, the Validity of Which is Involved.

This suit is one involving the validity of a formal written order of the Public Service Commission of the State of Montana, purporting to fix the value of complainant's electric system in the Forsyth, Montana district, and ordering drastic reductions in the company's rates for electric service (R. 6, 7, 20-24).

The Commission's order is dated September 23, 1935, requires the filing of the reduced rates on or before October 1, 1935, and makes such reduced rates effective as of October 1, 1935.

Evidence was presented by the complainant, in the record before the Commission, showing Book Cost to be $250,833.37; (R. 8, 33) Reproduction Cost, new, $235,737.00 (R. 7, 33); Reproduction Cost, depreciated, $206,864.00 (R. 7, 33); and the assessed value for tax purposes, of the electric system in question, to be $139,738.00 (R. 33).

The Commission, in its order, found the "Valuation for rate-making purposes" of said electric property, to be "not exceeding the sum of $90,000.00" (R. 21). It made no findings of value for any of the elements making up "fair value" (R. 21).

The Commission found the 1934 annual gross revenue from this system to be $49,268.65, the total 1934 operating expenses, including taxes and annual depreciation expense, to be $37,535.95 and the net operating revenue or income available for interest on investment (for the year 1934) to be $11,732.70 (R. 21).

The 1934 gross operating revenues were necessarily derived from rates in effect during 1934.

The evidence before the Commission disclosed that as of January 1, 1935 the complainant had put into effect, pursuant to an order of the Commission, a reduction in rates on the Forsyth system amounting to an annual reduction in revenue of $3,057.21, (R. 31). The effect of applying the reduced rates directed in the instant Commission order results in a further annual reduction of revenue in the amount of $11,233.60 (R. 11, 32). This makes a total reduction in gross revenue of $14,290.81, per year, as a result of the application of the two 1935 rate reductions. Deducting the $14,290.81 from 1934 gross revenue of $49,268.65 leaves gross revenue of $34,977.84, under the instant reduced rates. Under the reduced rates required by the instant Commission order, the operating expenses would exceed the gross revenues by $2,558.11 per year, with nothing whatever for return on the investment.

This clearly constitutes substantial, daily and continuing confiscation.

(c)

The date of the decree sought to be reviewed herein is April 9, 1936, and the date upon which the application for appeal is presented is April 17, 1936.

(d)

Nature of the Case and Rulings of the Court Bringing the the Case Within the Jurisdictional Provisions Relied Upon.

Upon receipt of the Commission order hereinabove referred to, the complainant, on September 28, 1935, filed with the State Commission a petition for rehearing and stay of its order, bringing to the attention of the Commission that the application of the reduced rates would result in the confiscation of complainant's property (R. 25-26). On Sep-

tember 28, 1935, the Commission entered a formal order denying said petition (R. 28).

Thereupon complainant commenced this suit in equity on October 1, 1935 to restrain the enforcement of the order, applied for a temporary restraining order and interlocutory injunction and moved to convene a three-judge court, which later heard the application for interlocutory injunction.

A temporary restraining order and order to show cause why interlocutory injunction should not issue, was signed by District Judge Pray on October 1, 1935. Under this order the complainant was required to impound with the court the difference between the existing and the reduced rates and furnish proper bond to guarantee compliance therewith (R. 38-41). The complainant filed the bond as required (R. 38-41) and has impounded and is continuing to impound, with the court the said difference in rates.

The bill of complaint alleged: (a) diversity of citizenship (R. 1, 4, 6), (b) the requisite amount in controversy, (R. 6), (c) that the laws of Montana prohibit the courts of that state from issuing an injunction *pendente lite* to restrain the enforcement of the Commission rate order (R. 14), (d) that complainant had no plain, speedy or efficient (adequate) remedy at law or in equity in the courts of the State, nor otherwise except by resort to the Federal district court to protect it against the confiscation of its property (R. 14, 15), (e) that enforced compliance with the Commission order resulted in immediate, daily, substantial and continuing confiscation in violation of the 14th Amendment to the Constitution of the United States (R. 14, 15), and (f) that the laws of Montana provided severe, recurring and cumulative penalties for failure to comply with the order, impose upon the attorney general of the State the duty to and that he would, enforce such penalty provisions (R. 14, 15).

The defendants filed no answer and did not otherwise controvert the allegations of the complaint or counter in any

respect the affidavits filed in support of the application for temporary restraining order. The defendants filed only a demurrer and motion to dismiss (R. 43, 44, 46).

The suit was on October 8, 1935, upon argument and brief, submitted to the three-judge court upon the jurisdictional questions raised by the demurrer and motion to dismiss (R. 45-47).

On February 3, 1936, the three judges filed a memorandum opinion granting the motion to dismiss the suit for lack of jurisdiction (R. 48-49). In this memorandum opinion the court does not discuss the questions involved, but disposes of this suit by the following:

> "The legal questions involved in these motions are like those before a three judge court convened at Helena June 5th, 1935, wherein three Public Utility Companies brought suits against the Public Service Commission of Montana, seeking the same injunctive relief as in the instant cases, and upon the same grounds, and were met with like motions to dismiss for lack of jurisdiction. An opinion in the aforesaid cases of June 5th, 1935, was filed in said court on Nov. 20th, 1935, in which all three judges concurred. We have considered that opinion in connection with the arguments and briefs of counsel in the present cases and agree in the main with the text and reasoning therein, and the authorities relied upon to support it. (*Montana Power Co.* v. *Public Service Com.*, No. 1506, *Butte Water Co.* v. *Public Service Com.*, No. 1513, *Fred A. Horning* v. *Public Service Com.*, No. 1514)" (R. 48-50).

The complainant, on February 5, 1936, filed an application for stay, *i. e.*, to continue the temporary restraining order in effect, under bond and conditions to be prescribed by the court, pending appeal to the Supreme Court of the United States (R. 51-52). This application was heard be-

fore one of the Judges of the court (Judge Pray) at Great Falls, Montana on March 6, 1936. Complainant at the hearing on application for stay presented evidence through witnesses in support of its application. Defendants presented no evidence (R. 53). The record thus made was transcribed and copies, together with briefs of counsel, forwarded at the direction of Judge Pray to the other members of the three-Judge Court, viz., to Hon. Bert E. Haney, Circuit Court of Appeals for Ninth Circuit, San Francisco, California, and Hon. James H. Baldwin, U. S. District Court, Montana, the latter then presiding pursuant to assignment in the United States District Court for the District of Arizona (R. 69). On April 9, 1936, the application for stay was by order of the three Judges denied and the temporary restraining order dissolved (R. 54). Decree of dismissal of the suit was filed on April 9, 1936.

Between October 8, 1935, when the suit was argued and submitted to the three-Judge court on application for interlocutory injunction and February 3, 1936, when the court filed its memorandum opinion granting defendants' motion to dismiss for lack of jurisdiction, the time within which complainant might commence an action against the commission in the state courts to vacate its valuation and rate order had expired. The time limitation on such an action is ninety (90) days from date of the Commission's order (Section 3906, Revised Codes of Montana, 1921) of September 13, 1935. This same statute, hereinafter discussed, expressly denies complainant a stay of the Commission's order pending such action.

The bill of complaint, the material allegations of which are admitted by the demurrer and motion to dismiss, discloses that the company presented evidence as to elements

of value, as of December 31, 1934, before the Commission as follows:

Cost of reproduction new (paragraph XI, R. 7)	$235,737.00
Cost of reproduction new less accrued depreciation (paragraph XI, R. 7)	206,864.00
Book Cost (paragraph XI, R. 7, 8)	250,833.37

The bill of complaint alleges that this evidence of value was given no consideration by the Commission (paragraph XI, R. 8) and that no substantial controverting or other evidence was offered by any other party or person with respect to these elements of value (R. 8).

The affidavits accompanying the bill of complaint and filed in support of the application for preliminary restraining order disclose that there was offered in evidence before the Commission a statement showing the assessed value of the company's property in the system involved, was $139,738.00 (R. 33).

Each of the above valuation figures includes a steam plant—the only item of property disallowed by the Commission (R. 21). As an example of the extent and effect of such disallowance, this item (steam plant) with respect to the "Cost of Reproduction, Depreciated", amounts in round figures to $51,823.00 (R. 37). The Cost of Reproduction depreciated is therefore stated in the affidavit accompanying the bill of complaint as $155,041.00 (R. 8, 32), to be comparable with the Commission finding of value of "not to exceed $90,000.00," *i. e.*, with the steam plant eliminated. Under the Commission's order the same disallowance (approximately $51,823.00) would be deducted from the above figures "Reproduction Cost, New", "Book Cost", etc.

In the face of this substantially uncontradicted evidence with respect to value the Commission fixed the rate base at "not to exceed $90,000.00."

As shown by said affidavits accompanying the bill of complaint, the order directs an average reduction in rates of approximately 24.31% and reduces the annual gross revenue in 1934, from $49,268.65 to $34,977.84, or an annual reduction of $14,290.81 (R. 11, 32); that applying the reduced rates to the 1934 business the complainant would suffer an actual out-of-pocket loss of $2,558.11 per year, *i. e.*, the operating expenses would exceed the gross revenue by that amount, without any allowance whatsoever by way of return on the investment.

This makes an admittedly clear case of substantial, daily and continuing confiscation.

Complainant filed its suit in the United States District Court for Montana and presented its application for interlocutory injunction, because of the provisions of Section 3906 Revised Codes of Montana 1921, which reads insofar as material here, as follows:

> "No injunction shall issue suspending or staying any order of the Commission except upon application to the court or judge thereof, notice to the Commission having been first given and hearing having been had thereon; *provided, that all rates fixed by the Commission shall be deemed reasonable and just and shall remain in full force and effect until final determination by the courts having jurisdiction.*" (Italics ours.)

This section clearly denies an injunction *pendente lite* against a rate reduction order of the Commission.

While no direct challenge to the constitutionality of the foregoing statute has been presented to the Supreme Court of Montana, that court has on more than one occasion given consideration to and applied the proviso above quoted.

The section was quoted in *Billings Utility Co.* v. *Public Service Commission,* 62 Mont. 1, 203 Pac. 366 (1921), and this comment made:

> "The rates fixed, as by the statute directed, are *prima facie lawful,* can be attacked in court on the sole ground that they are unlawful or unreasonable, shall be deemed reasonable and just until final determination by the courts and the burden of proof rests on the party antagonizing the order."

The section was again considered in *State ex rel. Public Service Commission* v. *Great Northern Utilities Co.,* 86 Mont. 442, 284 Pac. 772 (1929), and this comment made:

> "the statute *prohibits the court* in such an action from *issuing an injunction pendente lite* and declares that the 'rates fixed by the Commission shall be deemed reasonable and just, and shall *remain in full force and effect until final determination* by the courts having jurisdiction' (Secs. 3905 and 3906, Rev. Codes 1921), and Sec. 3911 Id., specifically authorizes mandamus proceedings to compel obedience to the orders issued." (Italics ours.)

The Board of Railroad Commissioners of Montana is, *ex officio,* the Public Service Commission of Montana (Section 3880, Revised Codes of Montana, 1921). In the act creating the parent Board there is found Section 3809 Revised Codes of Montana, 1921 (formerly Section 4390, Revised Codes, 1907) reading, in part, as follows:

> "That *until the final decision* in any such action the classification, rate, toll, charge, regulation or *order of the board* affecting rates or charges *shall be deemed to be final and conclusive:* and provided, further, that in any action, hearing or proceeding in any court, the classification, rate, tolls, charges, regulations and orders made, fixed and established by said board shall *prima facie* be deemed to be just, reasonable and proper." (Italics ours.)

These provisions were directly examined by the Supreme Court of Montana, in *State ex rel. Board of Railroad Commissioners* v. *District Court,* 53 Mont. 229, 233; 163 Pac. 115 (1917) and this conclusion expressed:

> "Provisos to the same effect are found in section 4391. They are not expressed in the most apt and appropriate terms; yet it is obvious, we think, that it was the purpose of the legislature in enacting the first to *restrict the power of the court to disturb or suspend the operation of an order of the board promulgating a rate or charge until final judgment;* while by the second it was the purpose merely to declare the rule by which the evidence must be weighed with reference to this kind of order as well as any other which the board may promulgate. *The effect* of the first *is to take from the court all power of control over any order relating to rates and charges except by final judgment. This necessarily deprives a* railroad *company* as well as the shipper, *of the right to invoke,* and *prohibits the court from issuing a preliminary injunction in this behalf.*" (Italics ours.)

The defendants, in support of their demurrer and motion to dismiss, contended the Johnson Act, *post,* removed from the Federal District Courts jurisdiction in suits such as the one at issue, and further contended the decision in *Porter* v. *Investors Syndicate,* 286 U. S. 241, 76 L. Ed. 1226, 52 S. Ct. Rep. 617, was controlling of the issue.

The complainant contended that: (a) the Johnson Act did not remove the jurisdiction but specifically retained it in the Federal District Court, where with respect to rate cases, admittedly involving confiscation, the State law did not provide a "plain, speedy and efficient remedy" to protect against substantial, daily and continuing confiscation; (b) the laws of Montana did not provide such a remedy—

but on the contrary, such laws expressly deny the complainant an injunction *pendente lite;* (c) the *Porter* case, *supra,* is not applicable because it was based upon other and dissimilar statutes, *i.e.,* (1) statutes giving the State court legislative powers or functions and making the rule in the *Prentis* case applicable, and (2) supersedeas was available in the *Porter* case under the general appellate and procedural statutes of the State; (d) neither of these grounds was present in the instant suit; and (e) the rule announced in *Pacific Telephone and Telegraph Co.* v. *Kuykendall,* 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553, is controlling of the issue presented.

The Johnson Act (Act of Congress, May 14, 1934—48 Stat. at L. 775, Chap. 283, 28 U. S. C. A., Sec. 41 (1)) provides as follows:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain, the enforcement, operation, or execution of any order of an administrative board or commission of a state, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, *and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.*" (Italics ours.)

By the italicized proviso, the Johnson Act specifically retains jurisdiction in the Federal courts to grant injunctive relief in confiscation cases such as that here presented.

In fact, the constitutionality of the Johnson Act itself would be in serious doubt were it not for this saving clause.

Corporation Commission of Oklahoma et al. v. *Cary, Trustee,* — U. S. —, 80 L. Ed. —, 56 Sup. Ct. Rep. 300.

Corporation Commission of Oklahoma et al. v. *Cary, Trustee,* 9 Fed. Supp. 709.

We do not believe it was the intention of either the framers of the Johnson Act nor of the Congress that that Act would deny to a citizen his rights under the Federal Constitution nor his resort to this Court in situations such as are presented by the instant suits wherein it is so apparent the State process is inadequate to afford relief.

Probably the best evidence of this is a statement of the Honorable John E. Benton of Washington, D. C., General Solicitor of the National Association of Railroad and Utility Commissioners, an organization which embraces within its membership the members of the State Public Service Commissions. As disclosed by the printed report of the hearings of the Judiciary Committee of the House of Representatives of the 73rd Congress, Second Session, Mr. Benton appeared on February 27th, 28th and March 1st, 1934, and supported this bill as the representative of the State Commissions. (U. S. Government Printing Office Document 45740, at p. 216-217.) Mr. Benton testified as follows:

> "In the brief filed on behalf of the Commonwealth Edison Co., the Peoples Gas Light Co. of Chicago, and various other utilities, the following assertion was made on page 6:
>
> " 'The fact is, as brought out later in this memorandum, that adequate relief against confiscation cannot, under the statutes of many, and perhaps most, states, be obtained by a utility during the process of appeal from a commission through the state courts.'

"The later statement in the brief, referred to in the quotation just made, appears on page 8:

" 'The State courts cannot, except in a few instances where they are given legislative authority in rate cases, grant by injunction any affirmative relief to the utility from the confiscatory order of the commission.'

"Similar statements have been made during the hearing by other utility counsel.

* * * * * * *

"Perhaps the shortest answer to make to this astonishing assertion of utility counsel, however, is that *by the plain terms of this bill, it will not be applicable,* in any state *where the courts* of the state *do not exercise jurisdiction to restrain confiscation.* The bill is to apply only in states where 'a plain, speedy, and efficient remedy' may be had in the state courts.

"The construction of the bill, if it becomes a law, and the determination whether the facts in any case, under the law as construed, are such that the act applies, *will be for the Federal District Courts,* with appeal to the United States Supreme Court. The *right to be protected against confiscation of property is a constitutional right.* The act recognizes that a utility suffering violation of any constitutional right is entitled to a speedy remedy, and reserves jurisdiction to the Federal Courts to protect it, *if in any state,* the state courts are *disabled to protect it.* In whatever states, if any, the state courts in fact are without power to give a 'plain, speedy and efficient remedy' this act will not apply; and *the jurisdiction of the United States district courts, as now existing, will continue to be exercised.*" (Italics ours.)

It is complainant's position the Federal Court has jurisdiction of the instant suit by virtue of the italicized proviso in the Johnson Act above, for the reason that Section

3906, Rev. Codes of Montana, 1921, denying as it does a stay or supersedeas pending final determination in a confiscation case—specifically denies to the complainant a 'plain, speedy and efficient remedy', in the courts of the State, to protect it against such confiscation of its property.

The defendants, further contended that Section 3906 Montana Code 1921, was unconstitutional, stated they would so concede, and suggested complainant could secure injunctive relief under the general statutes of the State.

The three judge court apparently agreed with this argument, for it states (in its opinion of November 20, 1935, R. 50) that the decision in *Porter* v. *Investors Syndicate, supra.*

> (a) "*is a plain direction to hold such a law* as we have been considering in Section 3906, denying a supersedeas or stay, unconstitutional and void, as violative of the provisions of the Constitution of the United States, for the reason, that it would permit the taking of the property of the complainant without due process of law, which is contrary to the Fourteenth Amendment" (R. 50).

and

> (b) "If the Supreme Court were to write a decision for our guidance in the interpretation of Section 3906, considered in connection with the Johnson Act, it could not do so more pointedly and effectually than it has done in the *Porter* case, and it cites the identical state statute to which recourse could be had by complainants for a stay of the commission's order, viz; Section 9243, which reads: 'Injunctive Order—When Granted; An injunctive order may be granted in the following cases;'
>
> " '1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such

relief, or any part thereof necessary in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

"'2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff.'"

We respectfully differ with the three-judge court in their interpretation of the *Porter* case, *supra,* and the application of the statutes of Montana referred to in that case.

The *Porter* case is not controlling here and the statutes in question in that case were materially different from Section 3906 referred to in the instant suit.

In the first place, the *Porter* case was a *Prentis* case, the State court having authority to "set aside, modify or confirm" the order of the State auditor—*Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67.

This is not a *Prentis* case—the State courts may only "vacate or set aside" Public Service commission rate orders. (Section 3906 Montana Code 1921.) In the second place, under the Montana statutes being considered in the *Porter* case direct provision was made for supersedeas or stay under the general statutes of the State (Secs. 4038 and 9243 as amended).

The statutes considered in the *Porter* case related to the powers and duties of another State officer (State auditor—ex officio Investment Commissioner) and had no relation to the statutes governing the Public Service Commission of Montana. In other words, the statutes considered in the *Porter* case are not the statutes applicable in the instant suit. As hereinafter discussed they gave to the courts of the State, powers upon review and authority with respect to stay, which were the exact opposite of the statute here in question.

In the *Porter* case, the Court was considering Sections 4038 and 9243 Montana Revised Codes, 1921.

Section 4038 Montana Revised Code, 1921, as amended by Ch. 194 Session Laws of 1931, is a part of Chapter 264, is known as the Blue Sky Law and is the Montana Act prescribing the powers, duties and functions of the State auditor (ex officio Investment Commissioner) who revoked the Syndicate's license in the *Porter* case. Section 4038 which provides the appellate procedure from his determinations, reads in part as follows:

> "The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the District Courts of this State * * * ."

Section 9243 referred to in the *Porter* case and in the opinion of the three judge court, relates to injunctions in equitable actions and is the general statute referred to in Section 4038. Neither Section 4038 nor 9243, *supra,* has any relation to the powers, duties or functions of the Public Service Commission of Montana. Section 9243 is quoted herein at pp. 14-15.

The sole powers of the courts of Montana with respect to Public Service Commission orders, are found in Section 3906 *supra.* Section 3906 is complete in itself, both with respect to functions of the State court in its final determinations and with respect to supersedeas or stay. Neither Section 3906 nor any other section of the Public Service Commission laws of Montana authorize or contemplate a resort to Section 9243, *supra,* or any other or general laws for appellate or injunctive relief pending appeal—the remedy is exclusive.

Neither do we agree with the three-judge court that the decision in the *Porter* case is "a direction" to that court to hold Section 3906 unconstitutional. On the contrary, the

court in the *Porter* case in discussing the meaning of Section 4038 of the Blue Sky Law, said:

> "We are persuaded to this view for the reason that it supports the constitutionality of the act, and we are bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality. *Bratton* v. *Chandler,* 260 U. S. 110, 67 L. Ed. 157, 43 S. Ct. 43. The construction thus adopted is consistent with the validity of the act, whereas that pressed upon us by the appellee would clearly render it unconstitutional.
>
> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board of commissioners. *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440, 454, 60 L. Ed. 1084, 1098, 36 S. Ct. 637. *But where either the plain provisions of the statute* (*Pacific Teleph. & Teleg. Co.* v. *Kuykendall,* 265 U. S. 196, 203 204, 68 L. Ed. 975, 980, 981, 44 S. Ct. 553) *or the decisions of the state court interpreting the act* (*Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353) *precludes a supersedeas or stay* until the legislative process is completed by the final action of the reviewing court, due process is not afforded, *and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.*" (Italics ours.)

In *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 68 L. Ed. 975, 44 Sup. Ct. 553, the Supreme Court said (L. Ed., p. 981):

> "A litigant whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the state tribunals, may properly base his application for equitable relief on the *effect of the statute and the presumption of its validity* and *is not required to*

establish that the state statute is not invalid under the state constitution. Dawson v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 296, 65 L. Ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case."

In *Union Pac. R. Co.* v. *Weld County*, 247 U. S. 282, 287, 62 L. Ed. 1110, 1117, 38 S. Ct. 510, the Court said:

> "An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. *The question is purely one of state* law, and, so far as we are advised, the Supreme Court of the state has not passed on or considered it. *A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law.* On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, *the situation is not one in which cognizance of the present suit properly can be declined.* (Italics ours.)

The quoted language from Sec. 3906, *supra,* is and was a part of Chapter 52 of the 1913 Session Laws of Montana. Chapter 52 enlarged the functions of the Railroad Commission of Montana and created the Public Service Commission, giving it jurisdiction with respect to the valuation and rates of electric and other utility companies, which it had not theretofore had or exercised.

Section 3880, Revised Codes of Montana, 1921, was Section 2 of said Chapter 52, Section 3880, in part, reads as follows:

> "The Board of Railroad Commissioners of the State of Montana shall be ex-officio the Public Service Commission hereby created, and for the purpose of this act shall be known and styled 'Public Service Commission of Montana.' • • • and in the name as

above set forth, it may sue *and be sued in the courts* of the state and of the United States. * * *'' (Sec. 2, Ch. 52, Laws '13.) (Italics ours.)

The quoted sections (3880 and 3906) being parts of the same act, and not having been amended or repealed, argue strongly the Montana legislative intent (in 1913 and today, 1936) that a public utility should, at its election, have the right to proceed in either the State or Federal court. Section 3880, *supra,* contains no provision that suits against the Commission in Federal court are limited to any particular class or character of suit or issue.

The Johnson Act, *supra,* was passed May 14, 1934. The regular session of the Montana legislature convened and adjourned during the early months of 1935, without amending or repealing either of these sections. (Montana Session Laws, 1935.)

These two State laws, one denying complainant an injunction *pendente lite* on appeal from an admittedly confiscatory rate order and the other authorizing the Public Service Commission to be sued in this Court compels the conclusion the legislature of Montana intentionally sought to supply a deficiency in Montana law (as measured by the Federal requirement of a plain, speedy and efficient remedy in consfication cases) by inviting resort to the Federal courts.

(e).

Cases Believed to Sustain Jurisdiction.

Pacific Telephone & Telegraph Co. v. *Kuykendall,* 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553;

Oklahoma Natural Gas Co. v. *Russell,* 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353;

Union Pacific R. Co. v. *Weld County,* 247 U. S. 282, 62 L. Ed. 1110, 38 S. Ct. 510;

Dawson v. *Kentucky Distilleries, etc.*, 255 U. S. 288, 65 L. Ed. 638, 41 S. Ct. 272;

Love v. *Oklahoma Operating Co.*, 252 U. S. 331, 64 L. Ed. 596, 40 S. Ct. 338;

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527;

Truax v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124;

Atlantic Coast Line v. *Daughton*, 262 U. S. 413, 67 L. Ed. 1051, 43 S. Ct. 620;

Davis v. *Wakelee*, 156 U. S. 680, 39 L. Ed. 578, 15 S. Ct. 555;

Ohio Oil Co. v. *Conway*, 279 U. S. 813, 73 L. Ed. 972, 49 S. Ct. 256;

Corporation Com. of Oklahoma v. *Cary, Trustee*, — U. S. —, 80 L. Ed. —, 56 S. Ct. 300;

Corporation Com. of Oklahoma v. *Cary, Trustee*, 9 Fed. Supp. 709.

(f).

Matter in Which the Specially Constituted District Court of the United States Abused Its Discretion.

The District Court erred and abused its discretion in the following respects:

1. In refusing to grant an interlocutory injunction where the admitted allegations of the bill of complaint and the undisputed affidavits filed therewith clearly disclosed substantial, daily and continuing confiscation of complainant's property and that the damage complainant will suffer, if the Commission order is permitted to become presently effective, will be irreparable.

2. In holding in its decision that the State of Montana affords "a plain, speedy and efficient remedy at law or in equity" in its courts within the meaning of the Johnson Act (Act of Congress of May 14, 1934; Judicial Code, Sec-

tion 24, 28 U. S. C. A., Section 41, Chapter 283, Section 1, 48 Stat. 775).

3. In holding that the Johnson Act divested the District Court of its jurisdiction in a confiscation case where the State statute denies stay or supersedeas pending final determination.

4. In sustaining the motion to dismiss for alleged lack of jurisdiction.

5. In refusing to issue the interlocutory injunction as prayed for.

6. In denying complainant a stay pending appeal to the Supreme Court of the United States.

7. In placing complainant to the hazard of severe and drastic penalties for failure to comply with said Commission order and submit to the confiscation of its property.

8. In failing to grant a stay pending appeal to the Supreme Court of the United States, requiring complainant to impound the difference between the existing and the reduced rates, and furnish a bond for the faithful compliance with such impoundment as has been done under the requirements of the preliminary restraining order.

Respectfully submitted,

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Dated April 17, 1936.

Filed April 17th, 1936. C. R. Garlow, Clerk.

(7737-C)

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1936

No. 39

MOUNTAIN STATES POWER COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, et al,
Appellees.

APPELLANTS' BRIEF

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Dated August 27, 1936.

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v.

PUBLIC SERVICE COMMISSION OF MONTANA, et al,
Appellees.

APPELLANTS' BRIEF

Opinion Below

A District Court, specially constituted under Section 266 of the Judicial Code, as amended, (U.S.C.A. Title 28, Sec. 380) for the District of Montana, Billings Division, on February 3, 1936, rendered an opinion sustaining Appellees' motion to dismiss Appellants' suit, brought to enjoin as unlawful and confiscatory, a valuation and rate order of the Public Service Commission of Montana and seeking interlocutory and permanent injunctions against said order. The memo. opinion of the District Court appears at R. 40, and the

prior opinion of that court, adopted for disposition of the instant suit, is reported in 12 F. Supp. at p. 946. Thereafter, the court entered its decree dismissing the suit (R. 44) and the complainant has appealed therefrom.

Application for stay pending appeal was made to the lower court (R. 41) and was denied (R. 43). Application was then made direct to this court for such stay and on May 7, 1936, and after oral argument, this court issued its injunction restraining the order of the Public Service Commission here involved, pending determination of this appeal or until further order.

Statutes (and Order) Involved

(a) This suit is one involving the validity of a formal valuation and rate order of the Public Service Commission of the state of Montana, with respect to appellants' electric system in the Forsyth, Montana district. The order is too lengthy to insert here but is set out in full at R. 17.

(b) Section 3906 Revised Codes of Montana, 1921:

> "Action to set aside rates or charges fixed by commission. Any party in interest being dissatisfied with an order of the *commission* (Public Service Commission) fixing any *rate or rates*, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants, to *vacate and set aside* any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice, or service, fixed in such order,

is unlawful or unreasonable. The commission and other parties defendant shall file their answer to said complaint within thirty days after the service thereof, whereupon such action shall be at issue and stand ready for trial upon twenty days' notice to either party.

"All actions brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the court shall always be deemed open for the trial thereof, and the same shall be *tried and determined* as other civil actions; any party to such action may introduce evidence in addition to the transcript of the evidence offered to said commission.

"No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon; provided, that *all rates fixed by the commission shall be deemed reasonable and just, and shall remain in full force and effect until final determination by the courts having jurisdiction.*

"If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence, the commission shall consider the same, and may modify, amend, or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulation, practice, or service complained of in said ac-

tion, and shall report its action thereon to said court within ten days from the receipt of such evidence.

"If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify, or amend the same, such altered, modified, or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

"Either party to said action, within sixty days after service of a copy of the order or judgment of the court, may appeal or take the case up on error as in other civil actions. Where an appeal is taken to the supreme court of Montana, the cause shall, on the return of the papers to the higher court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar.

"In all actions under this act, the burden of proof shall be upon the party attacking or resisting the order of the commission to show that the order is unlawful or unreasonable, as the case may be." (Italics and matter in parenthesis ours).

(c) The Johnson Act (Act of Congress, May 14, 1934, U.S.C.A., Title 28, Sec. 41 (1), added to Sec. 24 of the Judicial Code a proviso reading as follows:

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political

subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, *and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.*" (Italics ours.)

(d) Sec. 4038 Revised Codes of Montana, 1921, as amended by laws of 1931, Chapt. 194:

"Any interested person, who has appeared, copartnership, association or corporation being dissatisfied with any finding, findings or decision of the *Commissioner* (Investment Commissioner) made in accordance with the provisions of *this Act,* may within thirty days from the making thereof, commence an action in any court of competent jurisdiction against said Commissioner as defendant, to vacate and set aside said finding, findings or decision, on the ground that the said findings or decision are unjust or unreasonable. The *rules of pleading and procedure* in such action shall be the same as provided by law for the trial of equitable actions in the district courts of this state and on the hearing the judge of said court may *set aside, modify or confirm* said findings or decision as the evidence and the rules or equity may require. Appeals may be taken from the decision of the district court to the Supreme Court by either party in the same manner as is provided by law in other civil actions. Pending any such action, the said findings or decision of said Commissioner shall be prima facie evidence that they are just and reasonable and that the facts found are true, and

pending any such action the said findings or decision of the Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding.

"Provided, however, that the original application with reference to which an appeal is herein provided for shall not be heard by the Investment Commissioner until notice of hearing on the same has been published at the capital city daily, in at least seven issues of such paper, and provided further, that upon such hearing on the original application, any person, co-partnership, association or corporation interested in or opposed to said application may appear." (Italics and matter in parenthesis ours).

(e). Sec. 9243, Revised Codes of Montana, 1921:

"Injunction Order—When Granted. An injunction order may be granted in the following cases:

1. When it shall appear by the complaint by the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff;

3. When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

4. When it appears by affidavit that the defendant, during the pendency of the action, threatens, or is about to remove or dispose of his property,

with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition."

(f) Section 266 of the Judicial Code, as amended:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the

complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

(g) Section 1 of the Fourteenth Amendment of the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This court has jurisdiction of the instant appeal by reason of the provisions of Section 266 of the Judicial Code ante, in that this is a direct appeal from an order of a statutory court denying, after notice and hearing, an interlocutory injunction involving the constitutionality of a rate order of the Public Service Commission of Montana. The amount directly in controversy is the difference between the existing rates and the reduced rates as ordered by the Public Service Commission, which, in this case, amounts to $9,076.00 per year, R. 50.

Statement of the Case

On September 23, 1935, the Public Service Commission of Montana entered its report and order No. 1668 fixing the value for rate making purposes of the appellants electric system in Forsyth, Montana district (R. 17-22) at approximately *two-thirds its assessed value* for taxing purposes (R. 49), and directing the appellant to file with the Commission on or before October 1, 1935, (effective as of October 1, 1935, a revised schedule of rates (R. 19-22) under which, the allowable operating expenses, taxes and depreciation would sub-

stantially *exceed the gross revenue* (R. 9, 10, 18, 27) with *nothing for interest or return* on the investment.

On October 1, 1935, appellant filed in the Federal District Court for Montana its suit in equity seeking to restrain as unlawful and confiscatory the report and order of the Commission above referred to (R. 1).

The bill of complaint alleged: diversity of citizenship; the requisite amount in controversy; immediate, substantial, daily and continuing confiscation; that the laws of Montana (Sec. 3906, ante) prohibit the courts of that state from issuing an injunction pendente lite to restrain the enforcement of the said rate order; and that the complainant had no plain, speedy or efficient (adequate) remedy at law or in equity in the courts of the state, nor otherwise except by resort to the Federal District Court to protect it against such confiscation, (R. 1-16).

The defendants (appellees here) filed a motion to dismiss the suit upon the grounds:

(a) that the Federal District Court was without jurisdiction to entertain the suit or make any order therein, and,

(b) that the bill of complaint did not state facts sufficient to constitute a cause of action in that court (R. 36 and 37).

The appellees did not argue the second ground (sufficiency of the facts) and the lower court gave it no consideration in its opinion (R. 40).

The statutory court, consisting of Judge Haney of the Circuit Court of Appeals, and District Judges

Pray and Baldwin, granted the motion to dismiss (R. 40) and entered a decree dismissing the suit (R. 44), upon the ground that it was without jurisdiction by reason of (a) the Johnson Act ante, (b) the ruling of this court in *Porter v. Investors Syndicate,* 286 U.S. 461 (1932), and (c) the lower court's own prior decision in *Montana Power Company v. Public Service Commission of Montana, et al,* reported in 12 F. Supp. at p. 946.

Assignments of Error

The District Court erred and abused its discretion in the following respects:

1. In refusing to grant an interlocutory injunction where the admitted allegations of the bill of complaint and the undisputed affidavits filed therewith clearly disclosed substantial, daily and continuing confiscation of complainant's property and that the damage complainant will suffer, if the Commission order is permitted to become presently effective, will be irreparable.

2. In holding that the laws of the State of Montana afford appellant "a plain, speedy and efficient remedy at law or in equity," in the courts of the state, within the meaning of the Johnson Act, ante.

3. In holding that the Johnson Act divested the District Court of its jurisdiction in a confiscation case where the State statute denies stay or supersedeas pending final determination.

4. In holding Section 3906 Revised Codes of Montana, 1921, to be unconstitutional.

5. In holding the decision in *Porter v. Investor's*

Syndicate, ante, to be authority for or a "direction" to, so construe the said Section 3906.

6. In construing the decision in *Porter v. Investor's Syndicate,* ante, as giving appellant a clear right to stay pending final determination in the state courts of Montana.

7. In sustaining the motion to dismiss for alleged lack of jurisdiction.

8. In refusing to issue the interlocutory injunction as prayed for.

SUMMARY OF ARGUMENT

The position and contention of appellant was and is: (a) that the Johnson Act, ante, does not remove from the Federal District Courts jurisdiction in cases such as this but specifically retains such jurisdiction, where it appears the state law does not provide a plain, speedy and efficient or adequate remedy to protect against substantial, daily and continuing confiscation; (b) that the laws of Montana do not provide such a remedy,—but on the contrary such laws (Section 3906 ante) expressly denied appellant an injunction pendente lite; (c) *Porter v. Investors' Syndicate,* ante, used as the basis of decision by the lower court, is a *Prentis* case (211 U.S. 210). The rule in the *Prentis* case is not applicable because the courts of the state of Montana are not given authority to exercise a legislative function with respect to Public Service Commission rate orders,—they may only "vacate or set aside,"—they *cannot* revise or modify such orders; (d) *Porter v. Investors' Syndicate, ante,* is not applicable in the instant suit because it is based upon other and materially dissimilar state statutes, i. e.,

statutes giving the state courts legislative powers and functions with respect to orders of the officer there involved and making available stay or supersedeas under the general laws of the state; (e) neither of the powers referred to in (d) are present in the instant suit or appeal; (f) the rule announced in *Pacific Telephone & Telegraph Company v. Kuykendall*, 265 U. S. 196, is controlling of the issue here presented; (g) Appellant was under no obligation to have the constitutionality of Section 3906, ante determined, before seeking relief in a Federal court.

(A)

The Johnson Act, Does Not Divest This Court of Jurisdiction in The Instant Case

The Johnson Act specifically retains in the Federal District Courts, jurisdiction in suits such as the instant one where a plain, speedy and efficient remedy is not provided in the courts of the State. The language and unequivocal intent of Section 3906, Revised Codes of Montana, 1921, calls for no argument, construction or illustration to determine its plain meaning. It says clearly that the courts of the state are prohibited from issuing an injunction *pendente lite* with respect to rate reduction orders of the Public Service Commission of Montana.

While no direct challenge to the constitutionality of Section 3906, ante, has been presented to the Supreme Court of Montana, that court has on more than one occasion given consideration to, quoted, and applied the prohibition therein contained.

The section was quoted in *Billings Utility Co. v.*

Public Service Commission, 62 Mont. 1, 203 Pac. 366 (1921), and this comment made:

> "The rates fixed, as by the statute directed, are *prima facie* lawful, can be attacked in court on the sole ground that they are unlawful or unreasonable, shall be deemed reasonable and just *until final determination* by the courts and the burden of proof rests on the party antagonizing the order."

The section was again considered in *State ex rel. Public Service Commission v. Great Northern Utilities Co.,* 86 Mont. 442, 284 Pac. 772 (1929), and this comment made:

> "the statute *prohibits the court* in such an action *from issuing an injunction pendente lite* and declared that the 'rates fixed by the Commission shall be deemed reasonable and just, and shall *remain in full force and effect until final determination* by the courts having jurisdiction (Secs. 3905 and 3906, Rev. Codes 1921), and Sec. 3911 Id., specifically authorizes mandamus proceedings to compel obedience to the orders issued." (Italics ours.)

The Board of Railroad Commissioners of Montana is, ex officio, the Public Service Commission of Montana (Section 3880, Revised Codes of Montana, 1921). In the act creating the parent board there is found Section 3809 Revised Codes of Montana, 1921 (formerly Section 4390 Revised Codes, 1907) reading in part, as follows:

> "That *until the final decision* in any such action the classification, rate, toll, charge, regulation or *order of the board* affecting rates or charges *shall be deemed to be final and conclusive*: And provided, further, that in any action, hearing or proceeding in any court, the classification, rate, tolls,

charges, regulations and orders made, fixed and established by said board shall prima facie be deemed to be just, reasonable and proper." (Italics ours.)

These provisions were directly examined by the Supreme Court of Montana in *State ex rel. Board of Railroad Commissioners v. District Court,* 53 Mont. 229, 233, 163 Pac. 115 (1917), and this conclusion expressed:

> "Provisos to the same effect are found in Section 4391. They are not expressed in the most apt and appropriate terms; yet it is *obvious,* we think, that it was the purpose of the legislature in enacting the first to *restrict the power of the court to disturb or suspend the operation of an order of the board promulgating a rate or charge until final judgment;* while by the second it was the purpose merely to declare the rule by which the evidence must be weighed with reference to this kind of order as well as any other which the board may promulgate. *The effect* of the first *is to take from the court all power of control over any order relating to rates and charges except by final judgment. This necessarily deprives a* railroad *company* as well as the shipper, *of the right* to invoke, and *prohibits the court from issuing a preliminary injunction in this behalf.*" (Italics ours.)

We do not believe it was the intention of either the framers of the Johnson Act nor of the Congress that that Act would deny to a citizen, his rights under the federal constitution nor his resort to this court in situations such as are presented by the instant suits wherein it is so apparent the state process is inadequate to afford relief.

Probably the best evidence of this is a statement of

the Honorable John E. Benton, of Washington, D. C., General Solicitor of the National Association of Railroad and Utility Commissioners, an organization which embraces within its membership the members of the State Public Service Commissions. As disclosed by the printed report of the hearings of the Judiciary Committee of the House of Representatives of the 73rd Congress, Second Session, Mr. Benton appeared on February 27, 28 and March 1, 1934, and supported this bill as the representative of the State Commissions. (U. S. Government Printing Office Document 45,740, at p. 216-217), Mr. Benton testified as follows:

> "In the brief filed on behalf of the Commonwealth Edison Co., the Peoples Gas Light Co. of Chicago, and various other utilities, the following assertion was made on page 6:
>
> " 'The fact is, as brought out later in this memorandum, that adequate relief against confiscation cannot under the statutes of many, and perhaps most, States, be obtained by a utility during the process of appeal from a commission order through the state courts.'
>
> "The later statement in the brief, referred to in the quotation just made, appears on page 8:
>
> " 'The State Courts cannot, except in a few instances where they are given legislative authority in rate cases, grant by injunction any affirmative relief to the utility from the confiscatory order of the commission.'
>
> "Similar statements have been made during the hearing by other utility counsel.
>
> * * * * * *
>
> "Perhaps the shortest answer to make to this astonishing assertion of utility counsel, however, is that *by the plain terms of this bill, it will not be*

applicable in any state *where the courts* of *the state do not exercise jurisdiction to restrain confiscation.* The bill is to apply only in states where a 'plain, speedy and efficient remedy' may be had in the state courts.

"The construction of this bill, if it becomes a law, and the determination whether the facts in any case, under the law as construed, are such that the act applies, *will be for the Federal District Courts,* with appeal to the United States Supreme Court. *The right to be protected against confiscation of property is a constitutional right.* The act recognizes that a utility suffering violation of any constitutional right is entitled to a speedy remedy, and reserves jurisdiction to the Federal courts to protect it, *if in any state,* the state courts are *disabled to protect it.* In whatever states, if any, the state courts in fact are without power to give a 'plain, speedy and efficient remedy,' *this act will not apply;* and *the jurisdiction of the United States district courts, as now existing, will continue to be exercised.*" (Italics ours.)

Sec. 3906, supra, is and was a part of Chapter 52 of the 1913 Session Laws of Montana. Chapter 52 enlarged the functions of the Railroad Commission of Montana and created the Public Service Commission, giving it jurisdiction with respect to the valuation and rates of electric and other utility companies, which it had not theretofore had or exercised.

Section 3880, Revised Codes of Montana, 1921, was Section 2 of said Chapter 52. Section 3880, in part, reads as follows:

"The Board of Railroad Commissioners of the state of Montana shall be ex-Officio the Public Service Commission hereby created, and for the purpose of this act shall be known and styled 'Pub-

> lic Service Commission of Montana.' * * * "and in the name as above set forth, it may sue and *be sued in the courts* of the state and *of the United States.* * * *" (Sec. 2, Ch. 52, Laws '13.) (Italics ours.)

The quoted sections (3880 and 3906) being parts of the same act, and not having been amended or repealed, argue strongly the Montana legislative intent (in 1913 and today, 1936) that a public utility should, at its election, have the right to proceed in either the state or Federal court. Section 3880, supra, contains no provision that suits against the Commission in Federal court are limited to any particular class or character of suit or issue.

The Johnson Act, ante, was passed May 14, 1934. The regular session of the Montana legislature convened and adjourned during the early months of 1935, without amending or repealing either of these sections. (Montana Session Laws, 1935.)

These two state laws, one denying appellant an injunction *pendente lite* on appeal from an admittedly confiscatory rate order, and the other authorizing the Public Service Commission to be sued in Federal court, compels the conclusion the legislature of Montana intentionally sought to supply a deficiency in Montana law (as measured by the Federal requirement of a plain, speedy and efficient remedy in confiscation cases) by inviting resort to the Federal courts.

This court has not had occasion, since the passage of the Johnson Act, to pass upon situations such as are here presented. It did, however, consider the Johnson Act in *Corporation Commission of Oklahoma, et al. v. Carey, Trustee,* 296 U. S. 452. This case was re-

ported below in 9 F. Supp. at page 709.

Prior to the Johnson Act, the District Court of the United States, constituted as required by Section 266 of the Federal Judicial Code, as amended, had jurisdiction of any case involving the reasonableness or confiscatory character of rates prescribed by a state administrative board, provided the requisite jurisdictional amount was in controversy and provided further that the legislative process of prescribing rates had been completed. Such jurisdiction existed without reference to any remedy at law or in equity being available in the state courts to suspend the operation of such rates pending a judicial review.

Prendergast v. *New York Telephone Co.*, 262 U. S. 43,
Bacon v. *Rutland R. Co.*, 232 U. S. 134,
Love v. *Atchison T. & S. F. Ry. Co.*, 185 Fed. 321.

Neither the Johnson Act, nor any other act of Congress can, so long as we have provision in our constitution for the protection of property rights, take from a citizen his right to protection against the confiscation of his property.

The only present method of securing such protection is by resort to the courts. Since the laws of Montana deny such right he has recourse only to a federal court.

(B)

The Decision in Porter v. Investors Syndicate, 286 U. S. 461, Is Neither Applicable Nor Controlling Here.

Appellees, in argument and brief, have stated their

reliance upon the decision in the Porter case, ante, as decisive and controlling of the issue here presented. The Statutory Court adopted appellee's argument and based its decision squarely and solely upon an interpretation of the Johnson Act, ante, and the decision in the Porter case.

The Statutory Court said, (*Montana Power Company v. Public Service Commission of Montana, et al,* 12 F. Supp. at p. 951):

> "if the Supreme Court were to write a *decision for our guidance* in the interpretation of Section 3906, considered in connection with the Johnson Act, it could not do so more pointedly and effectually than it has done in the *Porter* case, and it cites the identical state statute to which recourse could be had by complainants for a stay of the commission's order, viz: Section 9243, which reads: 'Injunction Order—When Granted: An injunctive order may be granted in the following cases:
>
> " '1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such relief, or any part thereof necessary in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;'
>
> " '2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff.' "

We respectfully differ with the three-judge court in their interpretation of the *Porter* case, ante, and the application of the statutes of Montana referred to in that case.

The facts of the *Porter case* were these. The Investors' Syndicate was an investment concern licensed to

do business in Montana pursuant to a Blue Sky Law effective in 1930. The Syndicate had built up a considerable business under the authority of its license. The Montana state officer charged with the duty of granting and revoking such licenses promulgated a rule which would seriously interfere with the Syndicate's business and in that connection asserted his intention to revoke the Syndicate's license if it failed to obey the rule. The Syndicate thereupon filed its Bill in the Federal District Court seeking to enjoin the state officer from revoking the license for failure to comply with the order. A specially constituted court was convened under the provisions of Section 266, Judicial Code, and upon hearing before such court an injunction was granted. The case came to the Supreme Court of the United States by direct appeal. This court reversed the District Court upon the ground the Syndicate had failed to exhaust its administrative remedy under state law before applying to the Federal District Court for injunctive relief.

The *first* ground of the decision to be specially noted is that with respect to the sort of administrative order dealt with in the case. The portion of the decision pertinent to this matter reads as follows (286 U. S. at p. 468):

> "The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (supra) confers on any interested person dissatisfied with a finding or decision by the commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge '*may set aside, mod-*

ify or confirm said . . . decision as the evidence and the rules or (sic) equity may require.' The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely *judicial,* that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. The duty is laid on the court to examine the evidence presented and either to set aside or to *modify* or to affirm the commissioner's orders, as the proofs may require. *The legislative process remains incomplete until the action of that court shall have become final.* Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 229, 230, 53 L. Ed. 150, 160, 29 S. Ct. 67; Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 444, 450, 451, 60 L. Ed. 1084, 1095, 1097, 1098, 36 S. St. 637. And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. Keller v. Potomac Electric Power Co., 261 U. S. 428, 438-442, 67 L. Ed. 731, 734-736, 43 S. Ct. 445. When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year, an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety and legality of the order."

"The *present case* is not one in which the review of the commissioner's action is *judicial* in character. *If it were* the authorities cited by appellee which hold that one competent to invoke the jurisdiction of the federal courts *is not bound to pursue a judicial review* in the state courts would apply. See Bacon v. Rutland R. Co., 232 U. S. 134, 58 L. Ed. 538, 34 S. Ct. 283; Prendergast v. New York Teleph. Co., 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466; Railroad & Warehouse Commission v. Du-

luth Street R. Co., 273 U. S. 625, 71 L. Ed. 807, 47 S. Ct. 489. As we have seen, under the Montana statute the *administrative* proceeding is not complete until the court shall have acted in *revision and correction* of the commissioner's decision. It would be strange indeed if the commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative procedure existed. We cannot so read the act in the absence of clear and unambiguous phraseology requiring that course, or of a decision of the state court so construing it." (Italics ours.)

Under Montana law (Sec. 3906) the function of the state court with respect to orders of the Public Service Commission is solely judicial,—it prohibits the courts of that state from exercising legislative functions. The courts of the state under Section 3906, may only "vacate or set aside" Public Service Commission rate orders; they cannot modify them. We understand counsel for the appellees concedes the courts of Montana act only in a judicial capacity and in no sense do they exercise legislative functions with respect to such rate orders.

Therefore, the rule of the *Prentis case* (*Prentis v. Atlantic Coast Line,* 211 U. S. 210,) and similar cases does not apply with respect to litigation involving rate orders of the Public Service Commission of Montana.

The *Porter case,* was a *"Prentis case."* The instant suit is not a *"Prentis case."*

Apparently in the *Porter case,* it was not denied with respect to state court review of administrative action of the sort involved in *that case* the courts had some measure of legislative function. In this respect there

is a clear distinction between the *Porter case* and the case at bar, for it is definitely established the Montana courts exercise no legislative function in connection with their examination of orders of the Public Service Commission of Montana.

The *second point* to be specifically noted in the *Porter case,* is the ruling with respect to the availability of supersedeas under the Montana law there involved.

The court says that if a litigant will suffer irreparable harm by reason of an administrative order, in the absence of a stay, and *the state law does not afford such a stay, then there is a denial of due process,* and cites in support thereof, *Pacific Telephone and Telegraph Company v. Kuykendall, post.* We quote from the decision in the *Porter case* in that respect, as follows (286 U.S. at p. 470-471).

> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 454, 60 L. Ed. 1084, 1098, 36 S. Ct. 637. *But where either the plain provisions of the statute* (Pacific Telephone and Telegraph Co. v. Kuykendall, 265 U. S. 196, 203, 204, 68. L. Ed. 975, 980, 981, 44 S. Ct. 553) *or the decisions of the state court interpreting the act* (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353) *precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases*

> *where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.*" (Italics ours.)

But, the court says in the *Porter case,* under Montana law *there is provision for supersedeas* under the general procedural statutes of Montana there involved.

The section of the Montana law involved in the *Porter case* and relating to appeals from the state officer who had revoked the Syndicate's license (Sec. 4038) provided that such appeals might be taken under the general laws of the state relating to appeals. By the express provisions of those general laws an injunction *pendente lite* could be had.

Section 4038 of the Montana Code provided in part:

> "The rules of pleading and procedure in such action shall be the same as provided by law for the trial of equitable actions in the district courts of the state."

The general law, (Sec. 9243, ante) with respect to the trial of equitable actions provided for supersedeas.

Section 3906, here in question, is complete in itself, —both with respect to the judicial, as distinguished from legislative functions of the state court and with respect to supersedeas or stay. Neither Section 3906 nor any other section of the Public Service laws of Montana authorize or contemplate a resort to other or general laws for appellate or injunctive relief pending appeal. It is the sole authority of the Montana courts with respect to orders of the Public Service Commission.

It will thus be seen the *Porter case* is inapplicable to the situation here upon both grounds upon which it was decided, namely:

(a) in the *Porter case* the laws of Montana *authorized* the state courts to exercise legislative functions, whereas in the instant suits the state courts are *denied* the exercise of legislative functions;

(b) in the *Porter case* there was express *provision for supersedeas* or stay pending *final determination* in the courts of the state, whereas in the instant suit there is an express provision of the only applicable law (Sec. 3906) *denying supersedeas* or stay pending final determination.

(C)

Constitutionality of Section 3906, Montana Revised Codes—1921

The Statutory Court, in speaking of the decision in *Porter v. Investors' Syndicate*, ante, said (12 F. Supp. at p. 953), that that decision:

> "*is a plain direction to hold such a law* as we have been considering in Section 3906, denying a supersedeas or stay, *unconstitutional and void,* as violative of the provisions of the Constitution of the United States, for the reason, that it would permit the taking of the property of the complainant without due process of law, which is contrary to the Fourteenth Amendment."

We believe the Statutory Court was in error in its interpretation that the Porter case was a "direction" to that court to hold section 3906 unconstitutional. On the contrary, the court in the Porter case, in discussing the constitutionality of Section 4038 of the Montana Blue Sky Law said, (286 U. S. 470-471):

> "*But where either* the plain provisions of the statute (*Pacific Teleph. & Teleg. Co. v. Kuykendall,* 265 U. S. 196, 203, 204, 68 L. Ed. 975, 980,

901, 44 S. Ct. 553) *or the decisions of the State Court interpreting the act* (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 553) *precludes a supersedeas or stay* until the legislative process is completed by the final action of the reviewing court, due process is not afforded, *and in cases where the other requisites of Federal jurisdiction exist recourse to a Federal court of equity is justified.*" (Italics ours.)

Assuming for purposes of argument, that counsel for the Commission had some measure of authority to confess the invalidity of Section 3906, there would still remain a serious question as to what the Supreme Court of Montana would say in that respect. In other words, that court might well follow the rule announced by the Supreme Court of California to the effect that the legislature has power under the state constitution to deny injunctive relief.

Sprecles v. *Sugar Company*, 49 Pac. 353;
Wright v. *Superior Court*, 73 Pac. 145;
Barnett's Estate, 275 Pac. 453.

This court has indicated that such a determination is purely a question for the state courts.

Gasquet v. *Lapeyre*, 242 U. S. 367.

Justice Brandeis in his dissenting opinion in *Traux v. Corrigan*, 257 U. S. 354, 374 et seq, in discussing the right of a state to provide or deny injunctive relief, says:

"A state is free since the adoption of the Fourteenth Amendment, as it was before, not only to determine what system of law shall prevail in it, but also, by what process legal rights may be asserted, and in what courts they may be enforced. * * * As a state may adopt or reach trial by jury

* * * or, adopting it, may retain or discard its customary instances * * *. As a state may grant or withhold review of a decision by appeal * * * so it may determine for itself, from time to time, whether the protection which it affords to property rights through its courts shall be given by means of the preventive remedy or exclusively by an action at law for compensation.

"*Nor is a state obliged to protect all property rights by injunction* merely because it protects some, even if the attending circumstances are in some respects similar. The restraining power of equity might conceivably be applied to every intended violation of a legal right. On grounds of expediency its application is commonly denied in cases where there is a remedy at law which is deemed legally adequate. But an injunction has been denied on grounds of expediency in many cases where the remedy at law is confessedly inadequate. This, of course, whenever a dominant public interest is deemed to require that the preventive remedy, otherwise available for the protection of private rights, be refused, and the injured party left to such remedy as courts of law may afford.

Thus, courts ordinarily refuse, perhaps in the interest of free speech, to restrain action libels * * * in the interest of personal liberty that ordinarily refuses to enforce specifically, by mandatory injunction or otherwise, obligations involving personal service * * *. In the desire to preserve the separation of governmental powers they have declined to protect by injunction mere political rights * * * and have refused to interfere with the operations of the Police Department. * * * *Instances are numerous where protection of property by way of an injunction has been refused solely on the ground that serious public inconven-*

*ience would result from restraining the act complained of * * *.*" (Italics ours).

After mentioning other similar circumstances, Justice Brandeis continued:

"Such limitations upon the use of the injunction for the protection of private rights have ordinarily been imposed in the interest of the public by the court, acting in the exercise of its broad discretion. But in some instances the denial of the preventive remedy because of a public interest deemed paramount have been *expressly commanded by statute.* Thus, the courts of the United States have been prohibited from staying proceedings in any court of a state (Judicial Code, Sec. 265): and also from enjoining the illegal assessment and collection of taxes * * *.

"*What Congress can do in curtailing equity power of the federal courts, state legislatures may do in curtailing equity powers of the state courts,* unless prevented by the constitution of the state. In other words, states are free since the adoption of the fourteenth Amendment as they were before, either to expand or to contract their equity jurisdiction. The denial of the more adequate equitable remedy for private wrongs is in essence an exercise of the police power, but which, in the interest of the public, and in order to preserve the liberty and the property of the great majority of the citizens of a state, rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society." (Italics ours).

(The use of asterisks in the foregoing quotations from Justice Brandeis' opinion indicate omission of the decisions and statutes there cited.)

The language quoted last above should be a complete answer to the contention which we understand will be

made on behalf of the Montana Public Service Commission in the case at bar, to wit: that if Montana law denies a stay it is to that extent invalid and that Montana courts have power to grant a stay.

In *Pacific Tel. & Tel. Co.* v *Kuykendall,* 265 U. S. 196, this Court said: (p. 205)

> "A litigant whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the State tribunals, may properly base his application for equitable relief on the *effect of the statute and the presumption of its validity,* and *is not required to establish* that the *State statute is not invalid under the State Constitution. Dawson v. Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, 296, 65 L. Ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case." (Italics ours).

In *Union Pac. R. Co.* v. *Weld County,* 247 U. S. 282, the Court said: (p. 287)

> "An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. *The question is purely one of State law,* and, so far as we are advised, the supreme court of the State has not passed on or considered it. *A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law.* On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, *the situation is not one in which cognizance of the present suit properly can be declined.*" (Italics ours.)

It was not incumbent upon appellants to bring a

suit in the state courts, testing the validity of Section 3906, ante, as a prerequisite to a resort to the federal court for protection.

It cannot be charged that appellant in this case purposely sought to avoid jurisdiction of the state's courts, by resort to the Federal courts for any reason of policy, when there is taken into account the abortive valuation and rate order involved, and briefed and discussed at some length in the application before this court for a stay. If there ever was a case, which upon its merits would appeal to the equity of any court, the merits of this case bring it within that category.

In other words, appellant resorted to the Federal court because it was the only place where it had any assurance of receiving that plain, speedy and adequate remedy which the constitution of the United States contemplates and guarantees.

See Corporation Commission of Oklahoma v. *Carey,* 296 U. S. 452.

(D)

The Decision in Pacific Telephone and Telegraph Company v. Kuykendall, 265 U. S. 196, and Corporation Commission of Oklahoma v. Carey, 296 U. S. 452, State the Rule Applicable Here.

We respectfully request the indulgence of the court in a review of the facts and law involved in the *Pacific* case.

The facts of the *Pacific case,* ante were these. The Pacific Company filed its Bill in the Federal District Court to enjoin the Department of Public Works of Washington from interfering with the collection of

increased telephone rates filed with the Department, and the application of which was denied after hearing and order. The three judge court set aside the temporary restraining order issued by the District Judge on the filing of the Bill, and denied the application for temporary injunction. Upon a direct appeal, this court reversed the three judge court. After an appeal had been taken as stated from the dispostion of the matter by the three judge court, a single District Judge heard the case on a motion to dismiss the Bill, and granted the motion, and from this dismissal a second appeal was taken, and consolidated with the first appeal.

In examining the decision in the *Pacific case* supra, it must be borne in mind the court is dealing with two sorts of review procedure under the Washington Public Service Commission law. Sections 10428 and 10424 (Rem. Rev. Stat.) were treated as dealing with the special procedure for review of rate orders. Examining Sections 10428 the court said (265 U. S. at p. 200):

> "By the statutes of Washington (Rem. Com. Stat. 1922 Sec. 10428), any complainant affected by any order of the commission (now the Department), may, within thirty days, apply to the superior court of the proper county for a writ of review 'for the purpose of having its reasonableness and lawfulness inquired into and determined.' The Commission certifies the record upon which the court is to enter judgment affirming or setting aside the commission's order. If reversed for failing to receive proper evidence offered, the case is to be referred back to the commission to receive the evidence and enter a new order. The court may remand any case reversed by it to the commission for further action. *It is clear that the function to*

> *be performed by the superior court under this section is judicial.* It does not fix *rates* or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks into the reasonableness and lawfulness of the order of the commission, and is to determine whether evidence which should have been received was rejected, and, in that case, is to send the case back to the commission for a new order. *The court does not act legislatively.*" (Italics ours.)

Examining Section 10424 the court found that this provision denied a stay in a *rate* proceeding, and in discussing the effect of Sections 10428 and 10424 said (p. 201):

> "*It is apparent from these provisions that after the commission finally denied the increase of rates applied for, the company had exhausted its administrative remedy to avoid the alleged confiscatory rates under which it was compelled to render the service.* It had, therefore, no recourse but to a court. Both by reason of diverse citizenship and because of the Federal constitutional question, the Federal court of equity was available to it. The *state statute forbidding a stay* of proceedings until a final judicial decree was rendered, of course, *could not prevent a Federal court of equity from affording such temporary relief by injunction as the principles of equity procedure required.* The conditions set out in bill, therefore, seem to have made a case ripe for Federal relief. Bacon v. Rutland R. Co., 232 U. S. 134, 58 L. ed. 538, 34 Sup. Ct. Rep. 283; Prendergast v. New York Teleph. Co., 262 U. S. 43, 48, 67 L. ed. 853, 857, 43 Sup. Ct. Rep. 466." (Italics ours.)

The court next examined Section 10441 (Rem. Rev. Stat.), which was at that time the provision for *val-*

uation procedure and review, and with respect thereto held as follows (p. 202):

> "It is clear that the function of the courts in fixing the *valuation* of the property of the public utility is not confined to a judicial review of the work of the commission. The courts are made part of the valuation tribunal, pass on the weight of the evidence, and can set aside a valuation and make a new one. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. Rep. 445.
>
> "It is thus apparent that the contention of the Department and the state authorities that the company has not exhausted its remedy to secure a change in the valuation of the property by the superior and supreme courts of the state is correct, and that resort to them to change the *valuation* would be no bar to a resort to a Federal court of equity to enjoin the enforcement of rates based upon such valuation after it had been approved by the state courts. It was on this ground that the district court held, both on the application for a temporary injunction before the three judges and upon the final dismissal, that the bill was premature, and could not be brought until after the final confirmation of the valuation by the state supreme court."

Under a state law terminating the legislative process with respect to *rate* proceedings with the determination of the regulatory body, but continuing the legislative process in the state court with respect to *valuation* proceedings, this court found no difficulty in holding that a bill in the Federal court was not premature by reason of failure to exhaust state remedies.

With respect to the legislative function of the courts of the state of Washington under the preview of Section 10441 (*valuation*), it was argued by the Pacific

Company that the constitution of the state of Washington does not authorize the state legislature to vest the state courts with legislative power to fix *rates,* and that therefore after the Commission had fixed the valuation, further court procedure in fixing valuation would be void.

This Court declined to pass upon this contention, saying in effect, that it could put its decision upon other grounds. *The Attorney General appearing for the Department contended (according to the decision) that the courts of Washington have inherent power to grant supersedeas, and that Sections* 10429 *and* 10424 *construed to prohibit supersedeas would be invalid.* The court likewise declined to enter into this controversy and said (p. 205):

> "A litigant whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the state tribunals, may properly base his application for equitable relief on the *effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state Constitution.* Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 296, 65 L. ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case."

In the following additional cases, namely, *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, and *Love* v. *Oklahoma Operating Co.,* 252 U. S. 331, it is evident the state statute providing for a review of commission orders was there conceded to be unconstitutional, or it was so intimated or so treated, but, notwithstanding such fact, this Court upheld the right of the complainant to proceed directly in the lower federal

court. Complainant was not subjected to the burden of inventing a remedy nor to the burden of delay while his opponent worked out a dilatory review. The opinion of the Court in each of these cases shows that the question was present in the minds of the court without being resolved along the line contended for by counsel for the Commission.

That these matters with respect to the validity of Washington law in vesting the courts of that state with legislative functions with respect to *valuation* orders, and that the courts of Washington have inherent power to grant supersedeas notwithstanding Sections 10429 and 10424, were actually in the case and considered by the court (although the court refused to regard them as determinative) is shown by the following quotations from the brief of the attorney general. In that brief the attorney general makes the following contention at page 15:

> "Washington state courts have legislative authority in reviewing the order of the Department of Public Works here complained of."

In this portion of the brief he considered Section 10424 (rates) and Section 10441 (valuation) together and reached the conclusion that the Washington courts did have legislative power in a situation such as that presented in the *Pacific case.* He further contended, at page 22, that:

"Section 10441 Rem. Comp. Stat. is constitutional," basing his argument upon the citation of Washington cases he further contended, at page 27 of his brief, that:

"If Section 10441 Rem. Comp.. Stat. is unconstitu-

tional, it should be first so declared by the supreme court of the state of Washington."

On page 34 of his brief he commences an argument on the following point:

> "The supreme court of the state of Washington has inherent power to suspend an order of a lower tribunal by virtue of Article IV, Section four of the constitution of the state of Washington."

As previously indicated the court in effect declined to consider the contention of either party on these questions of state law and based its decision squarely upon the following, (p. 204):

> "In the case before us, the company is shown by the averments of its bill to be *suffering daily from confiscation under the rates to which it is now limited. It has done all it could to get relief, and cannot get it.* The rates here in question were in force for more than a year, the company advanced them, the old rates were reinstated by the Department of Public Works. In such a case, then, there was no chance for a stay. By Sec. 10429, (Rem. Comp. Stat. 1922) the pendency of any writ of review does not of itself, stay or suspend the operation of the order of the commission, but the superior court may suspend the order; but no order suspending an order of the commission relating to rates, etc., can be made unless the court finds that great or irreparable damage would be done to the petitioner, and the section contains the following proviso:
>
> "'Provided, however, that when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, *no supersedeas shall be allowed in any case from such*

order pending the final determination of the cause in the superior court, or, if appealed to the supreme court, by such supreme court.'

"Under such circumstances comity yields to constitutional right, *and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a Federal court of equity from suspending the daily confiscation, if it finds the case to justify it.* Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 293, 67 L. ed. 659, 662, 43 Sup. Ct. Rep. 353.

"In such a case the Prentis case has no application. Love v. Atchison, T & S. F. R. Co., 107 C. C. A. 403, 185 Fed. 321, 324, 325." (Italics ours.)

From the foregoing analysis it seems apparent the *Pacific case* was a much more difficult case from the standpoint of exhaustion of state remedies than the case at bar, and that the *Pacific case* must determine the case at bar irrespective of the *Porter case*. It is also apparent a major consideration in the application of the *Pacific case* is the factor of daily confiscation.

The record here clearly establishes such daily confiscation by reason of the application of the reduced rates ordered by the Montana Public Service Commission.

As the record here shows the Company applied to the Commission for a rehearing (R. 22) and a stay of the reduced rates, but in each instance its applications were promptly denied. (R. 24). Since the courts of the state cannot make new rates nor grant a stay, the appellant upon the filing of its suit in the federal court, had exhausted its remedy under state law, and stood subject to the imposition of severe penalties and the confiscation of its property.

The penalty for non-compliance with the Commission's orders is from one hundred to five hundred dollars per day,—each day's continued violation being a separate offense; (Sections 3888 and 3908 Revised Codes of Montana, 1921). The Attorney General of Montana is required by law to enforce the Public Service Commission rules and orders. (Section 3904, 3905 and 3910, Revised Codes of Montana, 1921).

The court in the *Porter case, supra,* in discussing its decision in the *Pacific case,* states the rule to be:

> "Where the plain provisions of the statute, precludes supersedeas * * * due process is not afforded and resort may be had to a federal court of equity."

In the opinion in the *Pacific case,* the case of *Dawson* v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, 296, is cited in support of the statement that the statute of Washington prohibiting a supersedeas pending the final determination of the case is presumed to be valid by the Federal Court. That was an equity case for an injunction to prevent the collection of taxes and the contention was made that there was a want of jurisdiction because of an adequate remedy at law by payment of the taxes and an action to recover. The court found that, in view of the statute and the decisions of the Supreme Court of Kentucky, there was a doubt whether the taxes, if paid, could have been recovered, and because of this doubt, the jurisdiction was sustained, the court said:

> "It is well settled that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit.'"

Union Pacific R. Co. v. *Weld County,* 247 *U. S.* 282; *Atlantic Coast Line R. Co.* v. *Daughton,* 262 *U. S.* 413.

In the recent case of *Carey* v. *Corporation Commission of Oklahoma,* 9 F. Supp. 709, a three-judge court, in a gas rate case, entertained jurisdiction because the court was in doubt whether, under the Constitution and statutes of Oklahoma, provision had been made for a judicial review of such an order. The court, in the opinion, said:

> "The Johnson Act (Jud. Code, paragraph 24, (1) 28 USCA Section 41 (1) deprives the United States courts of jurisdiction of controversies of this type only 'where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.' This court is unanimous in its opinion that whatever may be the eventual decision of the question so vigorously argued, it cannot now be said that there is a 'plain' remedy in the courts of the state.
>
> "We conclude, therefore, that *until the supreme court of Oklahoma determines* that the laws of the state afford a judicial review in some state court of an order of the Corporation Commission affecting rates chargeable by a public utility, *this court is not deprived of jurisdiction by the Johnson Act.*" (Italics ours.)

The decision of the Statutory Court in that case was affirmed in 296 U. S. 452.

Irrespective of the fact the Johnson Act was passed at a later date than the decision in *Pacific case, supra,* it specifically retains, rather than excludes, jurisdiction in the federal courts, of suits such as this.

The rule of the *Pacific case* has not been modified by subsequent decisions of this court. The *Porter case,*

reiterates the rule with approval. It was not modified by the Johnson Act. In fact, the Johnson Act, by the last exception therein, with respect to "plain, speedy and efficient remedies," carefully preserves the rule. Otherwise, the constitutionality of the Johnson Act would be in serious doubt.

Conclusion

These conclusions seem inescapable:

(a) The Montana statute denies appellant a "plain, speedy and efficient remedy" in the courts of that state;

(b) The Johnson Act does not divest the Federal Courts of jurisdiction in a confiscation case such as this, and in the presence of such a state law;

(c) The *Porter* case is not applicable;

(d) This is not a *Prentis* case;

(e) The rule announced in the *Pacific* and *Carey* cases is controlling;

(f) The decision of the Statutory Court should be reversed and that court directed to maintain in effect the existing impoundment of revenues and the bond, pending the hearing and determination of the application for interlocutory and permanent injunctions.

Respectfully Submitted,

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Dated August 27, 1936.

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IN THE

Supreme Court of the United States

October Term, 1936

No. 39

MOUNTAIN STATES POWER COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, et al,
Appellees.

APPELLANTS' REPLY BRIEF

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Statement of the Case

The appellees assert that the allegations of appellant's complaint in the court below have not yet been established and will be controverted by answer.

The question of jurisdiction, here involved, was submitted to the lower court, upon appellees' motion to dismiss (R. 40), which is the equivalent of a demurrer. No answer has yet been filed.

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiff's legal rights under the 14th Amendment, we are at as full liberty to consider them as was the State Supreme Court." (Citing cases).
>
> *Truax* v. *Corrigan*, 257 U. S. 312, 324.

Reply to Appellees' Proposition Concerning Constitutionality of Section 3906, Revised Codes of Montana, 1921, Denying Injunction Pendente Lite.

The sole proposition in justification of the lower court's denial of jurisdiction, presented by appellees in their brief, is that Section 3906 R.C.M., 1921, in so far as it denies an injunction pendente lite, is unconstitutional and void, that so being, the statute should be read as though that provision were not in it, and that the appellant company should have proceeded in the State courts irrespective of that direct statutory prohibition.

Appellees admit that as the statute now stands it does deny injunctive relief against the confiscatory rate order pending final determination by the State courts.

When occasion arose to bring this suit the provision referred to stood upon the statutes of Montana as a valid law, construed by the courts of that State to mean just what it says in plain English, namely:

> "You can have no protection against the confiscation of your property while you are awaiting a determination of the merits of your case by the courts of this State."

A decision by this court as to the jurisdiction of the State courts under the constitution and laws of Montana is not binding upon the courts of that State; that is a question of state law which the courts of Montana may determine for themselves. In other words, this court can give appellant no assurance that the courts of Montana will afford a plain, speedy and efficient remedy to protect it against the admitted substantial, daily and continuing confiscation of its property.

In *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369:

> "And, as our decisions show, there is nothing in the clauses of the 14th Amendment guaranteeing due

> process and equal protection which converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the state into anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court." (Citing cases.)

In *McDonald* v. *Oregon R. and Nav. Co.*, 233 U. S. 665, 669, the court said:

> "It is elementary and needs no citation of authority to show that the due process clause of the 14th Amendment does not control methods of state procedure * * *."

As an evidence that the Supreme Court of Montana may entertain a different view as to the constitutionality of Section 3906, supra, we again direct attention to three decisions of that court wherein it considered, quoted, construed and applied the statute as denying an injunction pendente lite upon appeals under the Public Service Commission law of the State. The decisions referred to are, *Billings Utility Company* v. *Public Service Commission*, 62 Montana 21, *State ex rel Public Service Commission* v. *Great Northern Utilities Company*, 86 Montana 442, and *State ex rel Board of Railroad Commissioners* v. *District Court*, 53 Montana, 229. These decisions are cited and quoted at pages 13-15 of appellant's opening brief. In none of these cases was the direct question of the constitutionality of the statute involved but they indicate a meaning of the statute as contended by appellant and as admitted by appellee.

Section 2 of Article VIII of the Constitution of Montana gives to the Supreme Court of Montana "appellate jurisdiction only." Section 3 of Article VIII of that constitution authorizes the court to issue injunctions "as may be necessary or proper to the complete exercise of its appellate jurisdiction." Section 3 of Article VIII further provides

that the jurisdiction of the State Supreme Court extends to "all cases at law and in equity, *subject,* however, to such *limitations and regulations as may be prescribed by law.*"

The Supreme Court of Nevada, in *Steamboat Canal Co.* v. *Garson, et al.,* 43 Nev. 298, was considering a provision of the Public Service Commission Law of Nevada, which was *identical* with the provision of Montana Law here in question. The Montana statute (Sec. 3906) and the Nevada statute (Sec. 26, Ch. 162, Laws of 1911) read as follows:

> "(a) No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon: Provided, that *all rates fixed by the commission* shall be deemed reasonable and just, and *shall remain in full force and effect until final determination* by the courts having jurisdiction."

In fact the entire section of the Nevada statute providing for appeals from Public Service Commission orders, was practically word for word with Section 3906 of Montana Revised Code, 1921. The procedure for reviewing Public Service Commission orders was identical in the two states.

The Supreme Court of Nevada, in the last above mentioned decision, *passed directly upon the constitutionality* of the above quoted proviso and said:

> "* * * We also conclude that the court was likewise wrong in vacating the order of the commission establishing the rate of $7.50 per miner's inch and restraining its collection by the Steamboat Canal Co. As already pointed out, Section 26 provides:
>
> > 'That all rates fixed by the Commission shall be deemed reasonable and just, and shall *remain in full force and effect until final determination* by the courts having jurisdiction.'

"The lower court disregarded this provision of the statute in vacating the order of the commission and in granting an injunction pendente lite. No reason for this action appears from the record, but as the statute is mandatory, and as counsel for respondents insists in this court that *it is unconstitutional,* we assume that the lower court entertained the same view.

"(10, 11) It is contended that the proviso is violative of Section 8 of article 1 of the Constitution guaranteeing that 'no person shall be * * * deprived of * * * property, without *due process of law,*' * * *"

"* * * The purpose of the proviso is, we think, reasonably apparent to maintain the rate during the pendency of the trial and until final judgment in the district court. And *this provision does not,* in our opinion, *trench upon the constitutional guaranty of due process of law.* The provision objected to must be taken in connection with the entire act of which it is a part when considered as to its encroachment upon the constitutional guaranty of due process of law. The ultimate purpose of the act is to regulate and control certain classes of business impressed with a public interest."

"* * * it was competent for the Legislature to prescribe that the rates fixed by the commission should abide during the temporary season of a trial to test their reasonableness. * * *"

"We think that none of the essentials necessary to insure to the parties a full guaranty of *due process of law* are absent from the statute, nor *impaired by the provision under consideration.*"

"(15, 16) But still statutes identical with the provisions making the findings of the commission prima facie evidence of reasonableness of rates have been uniformly upheld by the courts against constitutional objections, upon the theory that no person has a vested right in any rule of evidence. * * * The proviso does not withhold a remedy for the imposition of unreasonable rates. The remedy is merely deferred for a period of time which, considering the policy of the law towards the establishment of rates by the commission cannot be said to be unreasonable, especially

> in view of the fact that the statute accelerates the trial of this class of cases by giving them precedence over all civil causes of a different nature."

Section 4 of Article VI of the Constitution of Nevada contains no limitation, such as is found in Sec. 3 of Article VIII of the Montana Constitution. Both the Constitutions of Nevada and Montana contain a "due process" clause. Sec. 8, Art. I, Const. of Nevada, Sec. 27, Art. III, Const. of Montana.

The appellant was bound to assume the constitutionality of Section 3906, supra, at the time it instituted its suit in the Federal court, and was not required to hazard the continued confiscation of its property by bringing a suit in the State court, to test the constitutionaliy of that State statute.

The effect of the appellee's proposition is that Section 3906, supra, might be declared unconstitutional by the Supreme Court of Montana or that the courts of the State might grant a supersedeas notwithstanding the prohibition contained in the statute. We do not believe the court will indulge in any such speculation.

A statute is presumed to be constitutional and valid until it is declared unconstitutional by a court of competent jurisdiction. The constitutionality of Section 3906, supra, has not been passed upon by the Supreme Court of the State of Montana, although the constitutionality of an identical statute has been sustained by the Supreme Court of Nevada. (*Steamboat Canal Co.* v. *Garson,* 43 Nev. 298.)

Under the decision of this court (*Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196) appellant was not required to test the constitutionality of this state statute before acting upon it, but was justified in taking it at its face and proceeding accordingly. The Montana statute in plain terms denies supersedeas and when read in connection

with the Johnson Act is a direction to proceed in the Federal Court. The appellant pursued the only plain, speedy and efficient remedy available to it.

Reply to appellees' proposition that if Section 3906 R.C.M. 1921, is unconstitutional, appellant has a remedy under the general laws of the State relating to injunction.

Our answer to this proposition is, first, that Section 3906, supra, stood as a valid statute at the time this suit was instituted in the Federal Court, and had not been declared unconstitutional by the Supreme Court of Montana,—in fact an identical statute had been held constitutional, as affording due process, by the Supreme Court of Nevada. *Steamboat Canal Co.* v. *Garson.* Second, the remedy for reviewing orders of the Public Service Commission of Montana as provided by Section 3906, supra, was an exclusive remedy.

It is a well established rule of law of procedure and remedies, that where specific procedure is provided the litigant must avail himself of that procedure.

In *Barnet* v. *Muncie National Bank,* 98 U. S. 555, it was held that where a statute creates a right and provides a specific remedy, that alone applies. Appellant, therefore, was fully justified in looking solely to the specific procedure provided by Section 3906, supra, when it was called upon to consider what remedy it had and to what forum it could resort for relief from the confiscatory order of the Commission.

United States v. *Babcock,* 250 U. S. 328.
Bancroft Code Practice and Remedies, (1927) Vol. I, Sec. 135.

Conclusion.

It would be difficult to more concisely state the rule applicable in this appeal, than primarily in the words of Mr. Justice Roberts, in *Porter* v. *Investors Syndicate,* 286 U. S. 461, 471, and Mr. Chief Justice Taft in *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 205, namely,

(a) The "plain provisions" of Sec. 3906, R.C.Mont. 1921, and

(b) The "decisions of the state court interpreting the act," *Billings Utility Co.* v. *Public Service Commission,* 62 Mont. 21, *State ex rel Board of Railroad Commissioners* v. *District Court,* 53 Mont. 229, *State ex rel Public Service Commission* v. *Great Northern Utilities Co.,* 86 Mont. 442, and *Steamboat Canal Co.* v. *Garson,* 43 Nev. 298,

(c) Clearly "precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court." *Porter* v. *Investors Syndicate, supra.*

(d) A ruling by this court as to the constitutionality of Sec. 3906, supra, would not be binding upon the state court in its determination of its own jurisdiction under the Constitution and laws of Montana. *Gasquet* v. *Lepeyre,* 242 U. S. 367.

(e) Therefore, there is no "plain, speedy or efficient remedy" in the state courts.

(f) The appellant may of right "base his application for equitable relief (in the federal court) on the *effect* of the statute and the *presumption of its validity* and is not required to establish that the state statute" (is or) "is not invalid under the State Constitution," *Pac. Tel & Tel. Co.* v. *Kuykendall,* 265 U. S. 196.

(g) And "where the other requisites of federal jurisdiction exist" (amount in controversy, confiscation, etc.) "recourse to a federal court of equity is justified," *Porter* v. *Investors Syndicate, supra.*

(h) And this, irrespective of the Johnson Act, which specifically *retains* jurisdiction in the federal courts in

such cases, "where a plain, speedy, and efficient remedy may (not) be had at law or in equity in the courts of such state." Johnson Act, U.S.C.A., Title 28, Sec. 41 (1).

All matters in parentheses and italics ours.

We respectfully submit the lower court was in error in denying jurisdiction and dismissing the suit and its decree should be reversed with directions to maintain in effect the existing bond and impoundment pending the hearing and determination of the applications for interlocutory and permanent injunctions.

Respectfully submitted,

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FILED

IN THE

Supreme Court of the United States

October Term, 1936

No. 39

MOUNTAIN STATES POWER COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, et al,
Appellees.

APPELLEES' BRIEF

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ROBERTS, HELENA

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APPELLEES' BRIEF

Statement of the Case

The statement of the case as made by appellant is only partially correct.

It starts out with statements purporting to describe the order of the Commission. But it should be noted that this description is but a repetition of the allegations of appellants' complaint filed in the Court below.

Those allegations have not yet been established, and at the proper time and place they will be controverted by answer.

The right to do so was expressly reserved at the hearing in the Court below. (R. 39-40).

We do not now and did not in the Court below concede that those allegations can be sustained. We are prepared to defend the order in question at the proper time and place.

The only question presented to the Court below and the only question here involved is one of jurisdiction. In what Court must appellants go to attempt to establish the extravagant allegations made in the complaint? That is the sole question here involved.

ARGUMENT

It is our contention sustained by the court below (12 Fed. Supp. 946) that the Federal Court was and is without jurisdiction by reason of the Act of Congress of May 14, 1934, reading:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political sub-division thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates, chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state."

U.S.C.A. Title 28, Sec. 41 (1).

I.

(A) Remedy in the State Courts

The Montana Statutes provide for a judicial review of rate orders made by the Montana Public Service Commission.

Section 3906 R. C. 1921 in part provides:

> "Any party in interest being dissatisfied with an order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants, to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice, or service, fixed in such order, is unlawful or unreasonable."

That section further provides:

> "No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having first been given and hearing having been had thereon; provided, that all rates fixed by the commission shall be deemed reasonable and just, and shall remain in full force and effect until final determination by the courts having jurisdiction."

It is the last quoted proviso of this statute upon which appellant stands. In effect appellant contends that the remedy provided for by Section 3906 is not efficient since under the terms of the statute the order cannot be enjoined pendente lite.

(B) Sec. 3906 Unconstitutional in Part

Our position is that the State Statute which attempts to deny a stay pendente lite is unconstitutional and has been so held in Porter vs. Investors' Syndicate, 286 U. S. 461, 76 L. Ed. 1226. That case involved a Montana Statute (Sec. 4038 R. C. 1921) reading:

> "The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state . . . (and) pending any such action the said findings or decision of said Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding."

The Court speaking of that section said:

> "We are cited to no case, nor have we found any, in which the state courts have interpreted or applied the section. The first clause would obviously permit the issuance of an interlocutory injunction upon a proper showing, especially in view of the provisions of the Code of Civil Procedure. But it is said that the succeeding clause precludes such a remedy. The argument is that the words 'pending any such action' mean that during the continuance of the action and until its final decision the commissioner's order must remain in full force and effect. We think, however, that in this phrase the word 'pending' has the significance of 'until', or while the time is running for bringing such an action. This is one of the recognized meanings of the word, and that it is so used we think is made clear from the sentence immediately following, to the effect that if no action shall be brought to set aside the finding or decision within thirty days it shall become final and binding. When considered together we are of opinion that the two phrases mean

that unless and until a person affected brings his action he may not disregard the order."

The court then went on to say that unless the Statute were so construed as to give the right to a stay during the continuance of the action it would be unconstitutional. It said:

"We are persuaded to this view for the reason that it supports the constitutionality of the act, and we are bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality. Bratton v. Chandler, 260 U. S. 110. The construction thus adopted is consistent with the validity of the act, whereas that pressed upon us by the appellee would clearly render it unconstitutional."

Counsel for appellant contend that this decision is not applicable and controlling.

Their first contention on this point is that the Porter case is different from this because under the statutes involved in that case the state court in reviewing an order of the commissioner exercises legislative functions whereas reviews of rate orders under state statutes in Montana are judicial in character.

We think this is a distinction without a difference. The reason why the court declared such a statute unconstitutional was because of the harm that might result to interested parties if the order is effective pendente lite.

This is pointed out in the opinion of the court wherein it is stated:

"It would be strange, indeed, if the Commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative procedure existed."

Where the review is judicial the Court must either affirm or revoke the order under review. Where it is legislative the Court may modify the order.

Obviously, a harmful order passing under judicial review does more harm if effective pendente lite than one passing under legislative review for as to the former the entire order must fall whereas under the latter it may only be modified to eliminate that part which is harmful.

In other words let us suppose that on a rate investigation the facts would warrant a 20% reduction in the rates but the State Commission sees fit to reduce them by 25%. On a judicial review the entire order falls. On a legislative review the order will be modified by making only the 20% reduction.

If the order in each case is effective pendente lite the harm to the utility on a judicial review would be five times greater than on the legislative review. We contend, therefore, that there is more reason for condemning a statute denying a stay in a case where an order is judicially reviewed than in a case where the review is legislative. We believe the Porter case is decisive of this, and that it squarely condemns a statute denying a stay pendente lite in a case such as this.

If such a statute is not unconstitutional then appellant has a plain, speedy and efficient remedy in the state court, notwithstanding the statute.

Before appellant is in a situation to contend that the State Statute does not provide an efficient remedy it must show that under the State Statute a constitutional right is denied. If not the remedy is efficient. If the Statute denies a constitutional right, it is invalid to that extent.

Or, in other words, the only reason why the remedy in the State Court is not efficient is because the State Statute

denies a stay pendente lite. That is a denial of due process and hence the remedy is not efficient. Porter vs. Investors' Syndicate (supra). If it is a denial of due process, it is unconstitutional. If it does not deny due process then the remedy is efficient and the Johnson Act would apply.

Counsel next contend that the Porter case is inapplicable because we have no statute expressly authorizing injunctive relief.

(C) Other Valid Statutes in Montana Authorize Stay Pendente Lite

Our position is that since that part of Sec. 3906 which denies a stay pendente lite is unconstitutional, it is as if it were not in the Statutes.

In Hamilton vs. Board of Co. Com'rs., 54 Mont. 301, 169 Pac. 729, the Supreme Court of Montana said:

> "An unconstitutional statute is void, and a void thing is as nothing. A void statute is not a law. It imposes no duty, confers no authority, affords no protection, and no one is bound to observe it. In contemplation of law it is as inoperative as though it had never been passed."

To the same effect are the decisions of this court. Little R. & Ft. S. Ry. vs. Worthen, 120 U. S. 97, 30 L. Ed. 588; Norton v. Shelby Co., 118 U. S. 425, 30 L. Ed. 178.

Eliminating the provisions denying a stay, there would still be left in Section 3906 the following:

> "No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon."

It may be that where confiscation is alleged to be taking place during the period required for giving notice that the requirement of a notice and hearing is also unconstitutional. But whether so or not this language clearly contemplates the right of the Court to grant a stay. If all other restrictions in the statute must fall for want of due process, there is still left in Section 3906 the clear legislative purpose to vest the State Court with power to grant an injunction staying the operation of rate orders. We have in addition Sections 9243 et. seq. R. C. M. 1921 referred to and relied upon in the Porter case that have equal application here.

(D) Consideration of Appellants' Contentions

Under Sub-division (c) commencing on page 26 of Appellants' Brief appears this quotation from the Porter case:

> "But where either the plain provisions of the statute (Pacific Teleph. & Teleg. Co. v. Kuykendall, 265 U. S. 196, 203, 204, 68 L. Ed. 975, 980, 981, 44 S. Ct. 553) or the decisions of the State Court interpreting the act (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 553) precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of Federal jurisdiction exist recourse to a Federal court of equity is justified."

We agree entirely with that statement. That case was decided in 1932 and at that time recourse to the Federal Court was permissible. Federal and state courts at that time had concurrent jurisdiction, when there was diversity of citizenship or a Federal question was involved.

The Johnson Act changed that rule as of May 14, 1934.

Counsel on page 27 of their brief suggest that there may be some question as to what the Supreme Court of Montana might say on the question of the validity of Section 3906.

A good way to find out is to present the question to that Court. State District Courts treat Section 3906 insofar as it denies a stay as unconstitutional and grant restraining orders pendente lite and do so ex parte and without notice or hearing even when confiscation is not alleged during the period necessary to give notice.

This was done in a case arising in Park County, Montana. In no case has a stay pendente lite been sought and denied in the State Court.

It is suggested on page 27 of appellants' brief that the Supreme Court of Montana might hold that the legislature has power under the State Constitution to deny injunctive relief. California cases are then cited as well as two cases decided by this Court. We fail to see the applicability of these cases to the question under consideration here.

If counsel would contend that it is competent for the State Legislature to deny injunctive relief in rate cases then they are driven to the conclusion that they have an efficient remedy notwithstanding the denial of injunctive relief by the State Statutes.

That it is competent for the State Legislature to deny injunctive relief pendente lite has been exploded by the case of Pacific Tel. & Tel. Co. vs. Kuykendall, 265 U. S. 196, which we shall now consider.

(E) Consideration of Kuykendall Case

It should be remembered that the Kuykendall case was decided ten years before the Johnson Act was passed.

At the time of that decision as well as that in the Porter case there was concurrent jurisdiction in State and Federal Courts when there was diversity of citizenship or a Federal question was involved.

In the Kuykendall case the Court was asked to hold that the matter of reviewing a valuation on property of a utility was a legislative and not a judicial function and that, therefore, the action of the commission must be subjected to the court review provided for by state statute before resorting to the Federal Court. The Commission in that case contended that the Constitution of the State of Washington did not authorize the Legislature to confer legislative powers upon the courts.

The court in speaking of this contention, said:

> "It is our duty to avoid expressing an opinion on such an issue under the Constitution of Washington, in the absence of a clear decision by its highest court, if we can do so; and we think we can."

The court then discussed the Washington Statute which prevents a supersedeas when a rate under attack has been in force for more than one year. It said:

> "Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a federal court of equity from suspending the daily confiscation if it finds the case to justify it."

The court then made this statement:

> "As we have declined to look into the validity of the legislative functions with which the Washington state courts are vested in the valuation sections, so we decline to examine the validity of these restraints upon those courts to grant stays in cases of rates.

> A litigant whose constitutional rights are being invaded and to whom a statute denies a supersedeas in the state tribunals, may properly base his application for equitable relief on the effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state constitution. Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 296, 65 L. Ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case.

It is this statement of the court that complainants rely upon here.

It is obvious that that case is not controlling here. There the contention was made that the statute denying a supersedeas was in conflict with the State Constitution. This Court in that case simply adhered to its policy of deciding Federal questions only. Whether a state statute conflicts with the State Constitution is a question which this court has always refused to consider.

But when the question arose as to whether a state statute denying a supersedeas was in conflict with the Federal Constitution as denying due process of law, the court had no hesitancy in passing upon the question and in declaring such a statute to be clearly unconstitutional.

Porter vs. Investors' Syndicate (supra).

Moreover the statement of the court must be read in conjunction with its statement that the procedure on appeal in the State Court was a part of the legislative fixing of rates.

In other words, there is justification for the presumption of the validity of a State Statute denying a stay when the reviewing court acts legislatively. There is no such justification when it acts judicially.

When the reviewing court acts legislatively it cannot declare a statute denying a stay unconstitutional.

It can do so when it acts judicially.

Hence, at the time of the Kuykendall and Porter cases, the court was correct in holding that a statute denying a stay until the legislative process is complete should be presumed valid so as to permit the Federal Courts to grant relief—they then having jurisdiction in such cases. But when the reviewing State Court acts judicially as here, it can as well determine the validity of a statute denying a stay as can the Federal Court.

And when the court has pronounced definitely on the validity of the statute as it has in the Porter case, there is no longer any necessity or excuse for relying upon presumptions.

Counsel has cited the case of Carey vs. Corporation Com., 9 Fed. Supp. 709 affirmed in 296, U. S. 452.

We agree with the decision of that case.

Under the Oklahoma Constitution and Laws the review of rate orders by the State Courts is legislative and not judicial and the Johnson Act deprives the Federal Courts of jurisdiction only where there is a judicial review by state courts as in Montana.

II.

Montana Courts Have Never Denied a Stay Pendente Lite

There is not a single ruling of the Supreme Court of Montana holding that the State Courts cannot grant injunctive relief in such cases.

True, the Supreme Court of Montana has had occasion to either quote the statute or recite its substance but never has that Court passed upon the question.

Counsel for Complainants rely upon the case of State ex rel Public Service Com. v. Great Northern Utilities, 86 Mont. 442, 284 Pac. 772, as sustaining the claim that the State Court is prohibited from issuing an injunction pendente lite. That case does not so hold.

It simply stated that the statute, in terms, so declares. In that case it appears that an action was brought in the state court and the utility "asked for an injunction pendente lite but did not urge its issuance." This was before Judge Horsky. After the injunction action was commenced the Commission commenced an action in Mandamus in the same court but before another department presided over by Judge Poorman to enforce the Commission's order. The Mandamus action was dismissed and the order of dismissal was sustained by the Supreme Court.

The court in that case said:

> "In the ordinary action challenging an order requiring a utility to lower its rates on the ground that the order is unjust and unreasonable, the only question presented on application for mandamus to enforce the rates pending final determination would be as to the constitutionality of the statute authorizing such enforcement. * * * As the question of the constitutionality of the statute prohibiting injunction and authorizing mandamus to compel obedience to the order pending final determination was properly before Judge Horsky on application for the injunction pendente lite and could be presented at any time in the action pending, * * * This question of the constitutionality of the statutes was not raised before Judge Horsky, as the utility did not urge the issu-

> ance of an injunction pendente lite, and the commission could only raise the question by an application for mandamus in Judge Horsky's department in the same manner as it was raised in Judge Poorman's department."

Thus it will be seen that as late as 1930 the Supreme Court of Montana had suggested that the constitutionality of our statute denying a stay was an open question.

In the case of Billings Utilities Company vs. Pub. Serv. Com., 62 Mont. 21, the court did nothing more than to state what the statute provides.

The same is true of the case of State vs. District Ct., 53 Mont. 229, except that in this case the court construed the statute under consideration as not applicable to the kind of an order there being considered. Hence, it was unnecessary to make any comment upon the right of the court to stay the operation of a different kind of an order.

But in any case the court did not presume to pass upon the validity of the statute purporting to deny a stay.

But if by any stretch of the imagination it can be said that it has so held or intimated, then our position is that it did so before the decision in the Porter case and it would now be required to condemn the statute.

We fail to see anything in the statement of John E. Benton referred to on pages 16 and 17 of appellants' brief that is helpful in determining the question here involved.

Since reference to the debates in Congress has been made by counsel, it is well to note that a reference to the Congressional Record of the 73rd Congress 2nd Session Vol. 78, Part II, pages 1916-1917 discloses that Congress was dealing with particular reference to the Montana situation. Senator Johnson, the author of the Johnson Act,

in speaking for the bill read a lengthy letter written by the then counsel for the Board of Railroad Commissioners of Montana. The letter in part, as appears in the Congressional Record, reads:

> "We believe that as a matter of principle there exists no justification for the procedure that permits Federal judicial interference with the orders of a State administrative board until such time as adequate remedies available within the State have been exhausted. Public Utilities do not serve the public as a matter of constitutional right. The Supreme Court of the United States has affirmed the doctrine that a franchise to operate a public utility is not, like the general right to engage in lawful business, part of the liberty of a citizen. It being true that a public utility operates in a given State only by reason of a sovereign grant from the State, there appears to be no valid reason why disputes arising between the grantor of the franchise or privilege—the State—and the recipient thereof—the utility—should not be handled within the jurisdiction of the grantor, at least until the matter in controversy has been passed upon, on its merits, by the tribunal of the State having the final say, i.e., the highest appellate court. Then, if the utility is dissatisfied, it should have the right to a review of the strictly Federal question involved by the Supreme Court of the United States."

The letter then gives a review of a particular case (evidently the Great Northern Utilities case) and then proceeds:

> "This case illustrates how under present procedure the utility can play hide-and-seek with a State regulatory board. It is, as you know, the presently approved doctrine of the Supreme Court of the United States that State and Federal Courts have concurrent jurisdiction of cases of this sort and that a utility can proceed concurrently in both state and federal courts

until a final judgment is entered in one when that judgment becomes conclusive in the other as res adjudicata. In other words, a public utility has the right to proceed concurrently in both State and Federal tribunals on questions of law involved and then it may discontinue proceedings in the tribunal where the rulings have been adverse or unfavorable. The usual grounds for abatement of an action that there is another pending between the same parties involving the same questions is of no avail nor does the doctrine of election apply. Irrespective of the annoyance and expenses that such procedure causes a State commission, the doctrine that permits it is unsound."

Other portions of the letter need not be copied here. It is of particular significance that Congress was seeking to correct a situation particularly affecting the State of Montana. The question then is did it accomplish something or did it do a useless and idle thing? Did it waste its time and the people's money in a vain attempt to remedy a particular situation? The Porter case was decided before the Johnson Bill was enacted. The members of Congress are presumed to have had knowledge of it and patterned its legislation accordingly. There is a plain, speedy and efficient remedy in the State Courts and that ends the jurisdiction in the Federal Courts.

III.

The Johnson Act Should Be Liberally Construed

The Johnson Act is not a grant of additional authority to the Federal Courts, but the object and purpose of Congress in enacting it was to deprive the Federal Courts of jurisdiction. It should be liberally construed to effectuate the Congressional purpose and object. Doubts should be

resolved against and not in favor of jurisdiction in the Federal Courts.

Oklahoma Nat. Gas Co. vs. Russell, 261 U. S. 290, 43 S. Ct. 353;
Louisville & Nashville Ry. Co. vs. Finn, 235 U. S. 601, 35 S. Ct. 146;
Cumberland Tel. & Tel. Co. vs. Louisiana Pub. Ser. Com., 260 U. S. 212, 43 S. Ct. 75.

This Court has warned against the extention of the Federal Court jurisdiction in Oklahoma Gas & Elec. Co. vs. Okla. Packing Co., 292 U. S. 386, 54 S. Ct. 732, wherein it said:

> "The three-judge procedure is an extraordinary one, imposing a heavy burden on Federal Courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended."

IV.

The Johnson Act Is Valid

While the point is not stressed it is suggested in the brief of counsel on p. 41 that the Johnson Act is unconstitutional.

There is no merit in that suggestion.

Mississippi Power & Light Co. vs. City of Jackson, 9 Fed. Supp. 564;
Levering & Garrignes Co. vs. Morrin, 71 Fed. 2d, 226;
Kline vs. Burke Const. Co., 260 U. S. 226, 67 L. Ed. 226.

In the last cited case the court said:

> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.
>
> Turner v. Bank of North America, 4 Dall. 6, 10; United States v. Hudson & Goodwin, 7 Cranch, 32; Sheldon v. Sill, 8 How. 441, 448; Stevenson v. Fain, 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases but it requires an act of Congress to confer it. The Mayor v. Cooper, 6 Wall, 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. The Assessors v. Osbornes, 9 Wall, 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun cannot well be described as a constitutional right."

V.

It may be suggested that appellees should have taken advantage of the proviso in Section 266 of the Judicial Code, U. S. C. A. Title 28, reading:

> "It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State

court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

We think that since the Johnson Act deprives the Federal Courts of jurisdiction it was not incumbent upon us to in any manner recognize its jurisdiction by seeking merely a stay in the Federal Court.

Moreover, we were confronted with the definite statement in the case of Union Light, Heat and Power Co. vs. Railroad Com. of Ky., 17 Fed. 2d. 143, that if we attempted to avail ourselves of the privileges of Section 266 under the circumstances here (the restraining order having been granted) we would be in contempt of the Federal Court.

VI.

Sec. 3880 R. C. M. 1921 Does Not Aid Appellant

Our state statute does not and cannot enlarge the jurisdiction of the Federal Court. In the complaint it is alleged that the Public Service Commission may be sued in the courts of the United States by virtue of the provisions of Sec. 3880, R. C. of Montana 1921. Sec. 3880 specifies the name of the Commission as the "Public Service Commission of Montana" and provides that "in the name as above set forth, it may sue and be sued in the Courts of the State and of the United States." This statute, as shown by its wording, was merely intended to provide by what name the Commission shall sue and be sued both in State and Federal Courts. The Legislature of Montana never intended by this section to usurp the province of Congress in an attempt to define the jurisdiction of the Federal Courts.

It simply provided, in effect, that, when by law it is proper to sue the Commission in either State or Federal Court, the action may be brought against it, naming it as the "Public Service Commission of Montana."

Likewise in that name it must sue if it becomes a plaintiff or complainant.

If Sec. 3880 is open to the construction that it is an attempt to define the jurisdiction of the Federal Court it would be invalid as an attempt to interfere with powers and duties vested exclusively in Congress.

Section 3880 deals only with the name by which the Commission must be sued. Its scope is not enlarged by the enactment of the Johnson Act, or by the failure of the Legislature of Montana to change it since the passage of the Johnson Act.

Even under the Johnson Act there may be many cases wherein it is proper to sue the Commission in the Federal Court. Now, as heretofore, such an action must be brought against the Commission in its proper name as provided in Section 3880 and that is the only effect that can properly be given to Section 3880.

We respectfully contend that the lower court's decision concurred in by (5) different Judges is correct and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 38 and 39.—October Term, 1936.

Mountain States Power Company, Appellant, vs. Public Service Commission of Montana, et al., Appellees. (38)	Appeals from the District Court of the United States for the District of Montana.
Mountain States Power Company, Appellant, vs. Public Service Commission of Montana, et al., Appellees. (39)	

[December 7, 1936.]

Mr. Justice McReynolds delivered the opinion of the Court.

Each of these causes presents the same point of law.

Appellee, Public Service Commission of Montana, issued an order requiring the appellant Company to reduce its charges for electricity in Baker—# 38; also another requiring reduction in Forsyth—# 39. They were attacked as confiscatory by separate bills in the U. S. District Court. That court, three judges sitting, granted motions to dismiss for lack of jurisdiction. These direct appeals question its action.

Prior to May 14, 1934, paragraph one, Sec. 24, Judicial Code, as amended (U. S. C. A., Tit. 28, Sec. 41), provided:

"The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States,

or (c) is between citizens of a State and foreign States, citizens, or subjects . . .''

On that day the so-called Johnson Act (48 Stat. c. 283, p. 775) became effective. Section one directs:

''That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: 'Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.' ''

Sec. 3906 Revised Codes of Montana, 1921,—

''Any party in interest being dissatisfied with an order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants, to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice, or service, fixed in such order, is unlawful or unreasonable . . .

''No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon; provided, that all rates fixed by the commission shall be deemed reasonable and just, and shall remain in full force and effect until final determination by the courts having jurisdiction . . .''

Appellees maintain that under *Porter* v. *Investors Syndicate*, 286 U. S. 461, the inhibition of the Montana statute, against stay or

injunction prior to final determination, plainly conflicts with the Federal Constitution and should be disregarded. Further, that when this is eliminated there are other statutory provisions which permit the state courts to issue appropriate preliminary relief. Following *Montana Power Co.* v. *Public Service Commission et al.*, 12 Fed. Supp. 946, the court below sustained this view.

While the inhibition has not been definitely sustained by the Supreme Court of the State against an attack based upon unconstitutionality, it was recognized without suggestion of disapproval in *Billings Utility Co.* v. *Public Service Commisson et al.*, 62 Mont. 21, 32; *State ex rel. Public Service Commission et al.* v. *Great Northern Utilities Co.*, 86 Montana 442, 446. And see *State ex rel. Board of Railroad Commissioners* v. *District Court et al.*, 53 Mont. 229, 233.

Except for the Johnson Act appellant's Bills of Complaint would state causes of action within the jurisdiction of the Federal court. Obviously, also, the amendment relied upon has no application unless there is "a plain, speedy and efficient remedy" in the state courts. And we cannot conclude that such remedy exists where, as here, a state statute definitely denying it has not been authoritatively condemned. In the circumstances it is impossible to know what position the courts of the State would take. A "plain, speedy, and efficient remedy" cannot be predicated upon the problematical outcome of future consideration.

Porter v. *Investors Syndicate, supra,* is not controlling. Sec. 3906 Montana Codes was not there in question. And while the opinion may suggest reasons for challenging its validity, the Montana courts have not spoken; until they do we cannot treat the statute as non-existent. The essential remedy in the state courts does not emerge from the probability that the statute expressly prohibiting it may hereafter be declared ineffective. *Pacific Telephone & Telegraph Co.* v. *Kuykendall et al.*, 265 U. S. 196, 203-205.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.